Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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88-977
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

JURISDICTIONAL STATEMENT

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December 14, 1988

QUESTIONS PRESENTED

1. Whether the Colorado Public Utilities Commission's (PUC) interference with the wholesale rate design of Colorado-Ute Electric Association, a rural electric cooperative transmitting electricity in interstate commerce, was constitutionally permissible in light of the Commerce Clause of Article I, § 8, cl. 3 of the United States Constitution, the Supremacy Clause of Article VI, cl. 2 and the regulatory role of the Rural Electrification Administration.

2. Did the PUC violate Colorado-Ute's and the Members' right to due process, under the Fifth and Fourteenth Amendments, in admitting into evidence over their objection, pivotal testimony about the results of a computer analysis, while denying them any opportunity to examine the computer program itself, the supporting documentation, and supporting data which generated those results?

LIST OF PARTIES AND AFFILIATES

The appellants are Colorado-Ute Electric Association, Inc., (Colorado-Ute) and 13 of its 14 members. The appellants not listed in the caption are as follows: Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre de Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; San Miguel Power Association, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; and Yampa Valley Electric Association, Inc.

In addition to the parties set forth above, the parties below were: The Public Utilities Commission of the State of Colorado; Atlantic Richfield Company; Exxon Corporation; Shell Western E&P, Inc.

Empire Electric Association, also a member of Colorado-Ute appeared below aligned with Colorado-Ute. Empire has not joined as an appellant in this Court.

Colorado-Ute and its 14 members are affiliated. There are no other companies or entities with which the appellants are affiliated.

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JURISDICTIONAL STATEMENT

Colorado-Ute Electric Association, Inc. (Colorado-Ute) and thirteen of its member systems (Members), the appellants, appeal from the final judgment of the Supreme Court of Colorado, dated August 15, 1988, denying appellants' petitions for rehearing, thereby confirming its previous opinion dated July 11, 1988, upholding the orders of the PUC requiring Colorado-Ute to implement a seasonally-differentiated demand-energy rate. In so holding, the court rejected appellants' arguments that the PUC orders were constitutionally

impermissible under the Commerce, Supremacy, and Due Process Clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the Colorado Supreme Court which appears in the appendix hereto, page A-1, is reported at 760 P.2d 627 (Colo. 1988). The decision of the Montrose County District Court is reported at 74 PUR 4th 224 (1986). The decision of the PUC is reprinted at 55 PUR 4th 331 (1983). The other PUC decisions are not reported. The reported decisions, as well as the other decisions of the PUC, are reprinted in the appendix hereto, page A-70 and following.

JURISDICTION

The judgment of the Colorado Supreme Court affirming in part and reversing in part the decision of the Montrose County District Court was entered on July 11, 1988. Petitions for rehearing were filed by Colorado-Ute and the Members on July 25, 1988. See page A-162 below. The petitions were denied on August 15, 1988. See page A-152 of the appendix hereto.

A Notice of Appeal was timely filed in the Colorado Supreme Court on November 1, 1988. It is reprinted in the appendix hereto, page A-155. Colorado-Ute and the Members sought and were granted an extension of time until December 14, 1988 to file in this Court.

This Court has jurisdiction to review the judgment of the Colorado Supreme Court under 28 U.S.C. § 1257(2). For jurisdictional purposes, this Court may consider a state public utilities commission's order to be a statute under 28 U.S.C. § 1257. *Atchison, Topeka & S.F.R. Co. v. Public Util. Comm'n,*

346 U.S. 346 (1953). It is clear that Colorado law treats PUC ratemaking decisions as legislative acts as well. *Colorado-Ute Electric Association, Inc. v. Public Util. Comm'n of Colorado*, 198 Colo. 534, 602 P.2d 861 (Colo. 1979).

Jurisdiction is invoked under former 28 U.S.C. § 1257(2) which remains applicable to this appeal pursuant to § 7 of the Act of June 27, 1988, 102 Stat. 664, P.L. 100-352, which provides, among other things, that the amendments made by such Act shall take effect 90 days after the date of enactment and further provides that such amendments shall not affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date. This provision is applicable in this case since the judgment was entered on July 11, 1988. Alternatively, this Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const. art. I, § 8, cl. 3:

The congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . . .

U.S. Const. art. VI, cl. 2:

This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . .

U.S. Const. amend. V:

No person shall be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV:

No state shall make or enforce any law which . . . shall deprive any person of life, liberty or property without due process of law . . . .

HOW THE FEDERAL QUESTION WAS RAISED

This appeal concerns the lawfulness of certain orders of the PUC. These orders were based on a computerized analysis of the existing and future Colorado-Ute system. The analysis was prepared by the PUC staff using a proprietary program which, despite Colorado-Ute's objections, was never provided to Colorado-Ute.

The orders required Colorado-Ute to implement a seasonally-differentiated demand-energy rate in place of the flat energy rate agreed to by Colorado-Ute and the Members and incorporated in the all-requirements contracts between Colorado-Ute and the Members which were approved by the Rural Electrification Administration (REA).

During the proceedings before the PUC, Colorado-Ute specifically moved to have the computer program declared inadmissible. In addition, Intermountain Rural Electric Association, one of the Members, moved to dismiss the case for lack of jurisdiction, arguing that the PUC had no authority to regulate a rural electric cooperative operating in interstate commerce. In the Applications for Rehearing, Reargument, or Reconsideration filed by Colorado-Ute and the Members before the PUC, these issues as well as federal questions concerning unlawful confiscation of property, deprivation of due process, impairment of contract and violation of the Commerce and

Supremacy Clauses were raised. The PUC expressly rejected the arguments made by Colorado-Ute and the Members regarding these federal questions.

Colorado-Ute next asserted these issues in its Petition for Writ of Certiorari before the Montrose County District Court. The district court ruled in favor of Colorado-Ute and the Members, setting aside the order of the PUC though rejecting arguments of Colorado-Ute and the Members concerning the PUC's deprivation of due process.

On appeal to the Colorado Supreme Court, neither Colorado-Ute nor the Members, as the prevailing parties below, had any need to revisit the federal issues. Obviously, there was no reason, under the circumstances, to file a cross-appeal; therefore, in their arguments before the Colorado Supreme Court, Colorado-Ute and the Members responded only to the arguments raised by their opponents.

Upon the announcement of the Opinion of the Colorado Supreme Court reversing in part the Montrose District Court, Colorado-Ute and the Members filed petitions for rehearing raising the federal issues argued below. The petitions for rehearing are reproduced in the Appendix hereto, beginning at page A-162. Following review of the petitions for rehearing, the court denied them without opinion. It is clear that the court had ample opportunity to review the arguments concerning the federal questions raised by Colorado-Ute and the Members and its summary denial of the petitions constitutes a rejection thereof.

STATEMENT OF THE CASE

Colorado-Ute is a rural electric cooperative association engaged in the generation, transmission and sale at wholesale of electric energy to its members, 14 distribution electric cooperatives that are also its owners. Colorado-Ute is incorporated as a cooperative association under the laws of the State of Colorado and is operated under its bylaws on a not-for-profit basis. Colorado-Ute's Board of Directors is composed of 28 persons, each of Colorado-Ute's 14 member/owners designating two directors.

Colorado-Ute obtains the bulk of its power from power plants in Colorado owned by itself or jointly with other utilities that are based both inside and outside the State of Colorado. Colorado-Ute does, however, purchase some power on a regular basis from utilities that are located in states other than Colorado, e.g., Utah, New Mexico and Arizona.

The Members, all of which are also cooperative rural electric associations, purchase power from Colorado-Ute at wholesale under an "all requirements" contract and resell it at retail to their members who are the ultimate consumers. Some of Colorado-Ute's members have certificated territory in states other than Colorado, namely, Utah, Wyoming and New Mexico.

In addition to sales to its members, Colorado-Ute sells electricity at wholesale to utilities located in states other than Colorado, e.g., California, Arizona, New Mexico, Utah, etc. Currently, on a year-to-date basis, surplus sales outside the State of Colorado make up approximately 26% of Colorado-Ute's total sales.

Colorado-Ute is a member of the Inland Power Pool[1] and is connected to multistate grids, so that it is capable of transmitting or receiving power across state lines. In addition, Colorado-Ute regularly exchanges power with the federal government through the Western Area Power Administration.

In December 1981, Colorado-Ute filed Advice Letter No. 45 with the Colorado Public Utilities Commission (PUC) seeking a rate increase of approximately 12%. (A-9). At the time of that filing, Colorado-Ute's pricing scheme was on a "flat" or "all-energy" basis.[2] This pricing method had previously been approved by the PUC in February 1981, only ten months earlier. (A-10).

Although none of Colorado-Ute's customers nor anyone else had complained about the proposed rate, the PUC opened a case to investigate the requested increase. Twelve Colorado-Ute members intervened in this case as well as others, including certain oil companies. The oil companies presumably intervened since a demand-energy rate would tend to benefit high load-factor customers like themselves whose average cost

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[1] The Inland Power Pool is a power pool consisting of 15 utilities in five states (Colorado, New Mexico, Arizona, Utah and Wyoming), the members of which regularly exchange power and energy and reserve capacity, primarily for reliability purposes.

[2] As described by the Colorado Supreme Court, "[t]he flat or all-energy rate does not differentiate between 'demand' charges (fixed capital costs associated with the generation and transmission of electricity) and 'energy' charges (variable operation and maintenance expenses, especially fuel costs). Instead, it recovers all costs -- both demand and energy -- from a uniform charge per kilowatt hour (kwh)." (A-48, n.1).

per kilowatt-hour would be lowered. Any such lowered costs to the oil companies would necessarily result in other rural electric customers paying more for their electric service.

Pursuant to Colorado law, the rates filed became effective on January 14, 1982. C.R.S. § 40-6-111(4)(a). Following public hearings, the PUC entered its order approving the level of revenue requested by Colorado-Ute but disapproving the continued use of the flat rate, ordering Colorado-Ute to file a seasonally-differentiated demand-energy rate instead. (A-73). The PUC additionally allocated over $24 million in generation fixed or demand costs to the energy component of the demand-energy rate design. (A-11).

Colorado-Ute and the Members filed various applications for rehearing claiming, among other things, that the order of the PUC was preempted by the Rural Electrification Act and was an impermissible burden on interstate commerce; that the PUC's failure to provide Colorado-Ute with the program used to produce the cost-of-service study was a deprivation of due process and that the PUC's order was confiscatory and in violation of the U.S. and Colorado Constitutions.

These motions were, in all respects material to this appeal, denied. Colorado-Ute and the Members thereafter sought review in the Montrose County District Court pursuant to C.R.S. § 40-6-115, raising, among others, the same federal issues. The district court set aside that part of the PUC decision that required the filing of a new demand-energy rate as well as the portion concerning the reallocation. (A-12).

On appeal, the Colorado Supreme Court reversed the district court as to the PUC's authority to order the implementation of the demand-energy rate but upheld the district court's order concerning the reallocation. (A-47). In the

Supreme Court, neither Colorado-Ute nor the Members explicitly raised the issues presented in the district court concerning preemption, Commerce Clause, confiscation, or deprivation of due process. Having prevailed in the district court, Colorado-Ute and the Members had no basis to assert these claims on appeal; rather, Colorado-Ute defended the relevant portions of the district court opinion and answered the arguments presented by the appellants below.

Upon the publication of the Opinion of the Colorado Supreme Court, Colorado-Ute and the Members filed petitions for rehearing raising the constitutional claims. (A-162). The Supreme Court denied the petitions without opinion, thereby rejecting the constitutional claims.

THE QUESTION IS SUBSTANTIAL

I.

This case involves important issues concerning the extent to which states, through public utility commissions, may, consistent with the Commerce Clause, regulate rural electric cooperatives engaged in interstate commerce. There are currently approximately 62 rural electric cooperatives, that are either direct borrowers from the Rural Electrification Administration (REA) or beneficiaries of an REA guarantee and thus subject to REA regulation, operating as wholesale suppliers in interstate commerce.

In numerous states the public utility commission has asserted jurisdiction over generation and transmission cooperatives such as Colorado-Ute notwithstanding that these utilities may be engaged in interstate commerce. Given the state of the law as most recently enunciated in *Ark. Elec.*

Coop. v. Ark. Pub Serv. Comm'n., 461 U.S. 375 (1983) and particularly in light of the expansive scope of regulation asserted by the PUC in this case as well as recent policy changes by the REA, this case presents an opportunity for this Court to refine *Arkansas Electric*.

In *Arkansas Electric*, this Court was faced with a challenge by a rural electric cooperative utility to the attempted assertion of jurisdiction by a state public utilities commission over sales at wholesale in interstate commerce. Unlike the instant case, the challenge in *Arkansas Electric supra*, was a generic one, not concerning any specific rate order, merely contesting the right of the commission to assert any jurisdiction over the utility whatsoever.

In substance, this Court held that state regulation was not necessarily preempted and was not otherwise prohibited under the Commerce or Supremacy Clauses; states could regulate rural cooperatives so long as such regulation did not impermissibly impact interstate commerce or impair important federal interests.

What is important, however, and what needs to be addressed in this case is what the Court did not delineate in *Arkansas Electric*, namely the bounds of permissible regulation of rural electric cooperatives by state utility commissions. Due to this absence of authority, there is a substantial issue among the utility commissions of various states as to what are permissible subjects of state regulation. This expanded assertion of regulatory authority by utility commissions may have a significant adverse impact on interstate commerce and, in cases such as the instant one, may impair the cooperative's ability to repay the federal government.

In *Arkansas Electric*, this Court dispensed with the bright line previously utilized by this Court in determining whether public utilities in interstate commerce were subject to state or federal regulation.[3] In doing so, however, it left an ambiguity in the regulatory scheme.[4] It is precisely this ambiguity which needs clarification by this Court.

It is clear that the Congress intended wholesale rates of electricity in interstate commerce to be outside the realm of state regulation. 16 U.S.C. § 824(b); *see also Arkansas Electric, supra,* 461 U.S. at 396, (White, J., dissenting); *but see Arkansas Electric, supra,* 461 U.S. at 384.

Yet, notwithstanding congressional intent, rural electric cooperatives which are clearly engaged in interstate commerce have been made subject to state regulation in large part due to the fact that the Federal Energy Regulatory Commission (FERC) has declined to take jurisdiction. *See generally Dairyland Power Cooperative,* 37 FPC 12, 67 PUR 3d 340 (1967). The facts of this case as well as certain events that have occurred since the decision in *Arkansas Electric*, however, demonstrate that a further elaboration of *Arkansas Electric* is necessary.

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[3] *See generally Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company,* 273 U.S. 83 (1927).

[4] As stated in *Arkansas Electric*, "a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." 461 U.S. at 389. It is submitted by Colorado-Ute that this language invites disputes and provides little guidance in determining jurisdiction in a particular case.

In *Arkansas Electric* this Court stated as follows:

> There may come a time when the REA changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural Electrification Act, it would of course pre-empt any further exercise of jurisdiction by the Arkansas PSC.

461 U.S. at 388-89. The REA has, in fact, altered its policy taking a significantly more active role in the regulation of rural electric cooperatives. In a letter sent recently to Wabash Valley Power Association, Inc., an REA cooperative engaged in the transmission of electricity at wholesale in interstate commerce, the REA stated in part as follows:

> [W]e notify you that the REA hereby exercises jurisdiction over the rates charged by Wabash. Thus, the Indiana Commission and the Michigan Commission are no longer entitled to serve as regulatory authorities whose approval must be obtained for changes in Wabash's rates.[5]

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[5] Letter dated November 23, 1988 to Edward P. Martin, General Manager, Wabash Valley Power Association, Inc., from Jack Van Mark, Acting Administrator, REA. Copies of this letter were sent to the Indiana Utility Regulatory Commission and the Michigan Public Service Commission.

This is not the first time that the REA has asserted its authority vis-a-vis a state regulatory commission. On April 9, 1987, the REA notified Big Rivers Electric Corporation that, due to the refusal of the Kentucky Public Service Commission to permit Big Rivers a modest rate increase, it intended to " . . . suspend all loan and loan guarantee approvals and advances on loans and loan guarantees already approved to all electric and telephone borrowers in Kentucky."[6]

These actions clearly demonstrate a more proactive REA policy toward rate regulation of electric cooperatives. Given these recent actions, it is clear the REA has engaged in both direct and "inferred" preemption.[7] The adoption of this policy has created difficulties for rural electric cooperatives that are caught in the middle of this federal-state conflict; if they

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[6] Letter dated April 9, 1987 to Richard D. Heman, Chairman Kentucky Public Service Commission from Harold V. Hunter, Administrator of the REA.

[7] The REA has always had serious concerns about state regulation of the rates of rural electric cooperatives. As stated in the amicus brief of the United States filed in *Arkansas Electric*, 461 U.S. at 385:

> The spectre of state regulation poses a threat to the REA loan because of the possibility that the state may refuse to permit its cooperatives to pay a generation and transmission association the rates to which they agreed and upon the security of which the loan was issued. . . *If the state were to insist on a restructuring of the generation and transmission association's rate structure, the policies of the Act would be undermined. (Emphasis added).*

comply with the federal mandate they may be in violation of state regulations and, if not, they may be subject to federal sanctions. This Court now has the opportunity to untangle the federal-state dispute with respect to electric cooperatives.

Notwithstanding the foregoing, the conclusion in *Arkansas Electric* that state commissions are not explicitly preempted from regulating rural cooperatives is not determinative. *Arkansas Electric* also held that a particular rate set by a regulatory commission "may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." 461 U.S. at 389. That the level of state regulation of Colorado-Ute in this case creates a burden on interstate commerce and an impairment of important federal interests is demonstrated by a review of the facts.

In connection with its request for a rate increase, Colorado-Ute sought to continue the utilization of the flat rate design which had been approved by the PUC only ten months previous. The rate had been determined by Colorado-Ute management to be necessary and appropriate to the continuance of reliable service to Colorado-Ute's customers at economically competitive rates while simultaneously generating sufficient revenue to pay its obligations, including those to the federal government.

The flat rate selected by Colorado-Ute was endorsed by 100% of Colorado-Ute's customers. Moreover, it was incorporated into Colorado-Ute's "all requirements" contracts with each of its members. Although approving the amount of the rate increase as reasonable, the PUC nevertheless ordered Colorado-Ute to implement a seasonally-differentiated demand-energy rate.

The implementation of the PUC-ordered rate design will severely compromise Colorado-Ute's financial situation and consequently its ability to repay the federal government. In the PUC proceedings, there was uncontroverted testimony by Colorado-Ute that the seasonally-differentiated demand-energy rate favored by the PUC staff would produce severe revenue instability.[8] Further there was testimony that even the PUC staff believed that the demand charge would depress total peak demand. This would have the inevitable effect of reducing Colorado-Ute's revenues further, requiring additional rate increases merely to attain revenue levels approved by the PUC in this case.[9]

The flat energy rate favored by Colorado-Ute and its 14 members, the only customers affected, was selected in large part because of its simplicity and predictability. The flat rate also contributed to the goal of rate stability embarked upon by Colorado-Ute and its members. A return to the demand-energy rate and the attendant cash flow problems it engenders in the

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[8] This problem is exacerbated because the PUC rate would collect a much higher demand charge in the winter when Colorado-Ute's costs are lower and reduce the charge in the summer when Colorado-Ute's costs are higher.

[9] It should be noted that the PUC did not even make an express finding that the demand-energy rate would generate sufficient income to meet Colorado-Ute's revenue requirements.

Members would create a significant impact on interstate commerce.[10]

The rate increases and revenue instability referred to above, would seriously threaten the ability of Colorado-Ute and its members to repay their REA debts and to effectively compete in interstate commerce.[11] Under these circumstances, the PUC does not have the right, in accordance with *Arkansas Electric*, to impose its wishes on Colorado-Ute against its will and that of 100% of its members.

Finally, the order of the PUC goes beyond the mere setting of revenue level -- it asserts control over Colorado-Ute's rate design thereby intruding into the day-to-day operation of the

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[10] For example, a single cold day on the last day of the month could drastically increase the monthly demand charge to a member, notwithstanding no correlative increase in the amount of energy sold.

[11] The PUC-ordered demand-energy rate will have additional impacts on interstate commerce. For example, it will impair Colorado-Ute's ability to continue to offer lower interruptible rates, which have been effective in, among other things, retaining customers such as irrigators who might otherwise abandon the rural electric system altogether. To maintain such rates in the face of a demand-energy rate requires the installation of expensive metering, communications equipment and computer software to be able to accurately ascertain the total peak coincident demand of each Colorado-Ute member. Simple kilowatt-hour metering is insufficient for this purpose. The demand-energy rate will also impair the ability of qualifying small power producers and cogenerators to interconnect and produce power in accordance with the policy set forth in the Public Utility Regulatory Policies Act (PURPA) 16 U.S.C. § 824a-3 et seq., as well as Colorado-Ute's ability to wheel power between utilities in interstate commerce.

company which, of necessity, must be reserved to management. It is clear that the PUC order in this case goes further than the mere assertion of jurisdiction found in *Arkansas Electric* and involves the type of regulation that will impact interstate commerce and impair federal interests. This level of regulation is repugnant to the Commerce Clause and should not be permitted by this Court.

II.

At the heart of due process of law is a sense of fundamental fairness. In this case, the PUC admitted testimony about the results of a computer program analysis and expert testimony based on that analysis, while denying Colorado-Ute and the Members access to the computer program itself, the supporting documentation and supporting data. Two of the PUC staff witnesses relied on a computer analysis which examined the potential benefits which "would" result from the use of demand-energy rates. That program consisted of seven modules which interacted in the program to create the analysis.

The PUC staff did give Colorado-Ute access to data summaries and a general description of the program, including the identification of each module. It did not provide access to the computer code, the program plan, the program manuals or the input and output modules. A staff witness testified that it would take four months to duplicate his analysis *if* Colorado-Ute had access to all of the information about the program. That complete access was denied. That procedure is patently unfair. As a result, Colorado-Ute and the Members were effectively denied any right to meaningful cross-examination or to rebut expert opinion, based on "scientific computer analyses".

Historically, procedural due process has not required the adherence to any rigidly prescribed procedure in all cases. Procedural due process rules are, however, determined by the risk of error in the truth finding process as applied to cases in general. *See, e.g., Walters v. Nat. Assn. of Radiation Survivors*, 473 U.S. 305 (1985). Those who are summoned before a governmental agency in a quasi-judicial proceeding, involving life, liberty or property, are entitled to be fairly apprised of the government's proposals and to be heard before a final decision is reached. *Morgan v. United States*, 304 U.S. 1, 18, 19 (1938).

Courts and administrative agencies are now being faced with a new type of evidence -- results of computer analyses and simulations. With the inevitable proliferation of computer technology, there is an increasing reliance on such evidence. Computers have an aura of science, of infallibility, and accuracy, untainted by human error. That perception is often transferred to the results of any computer analysis, even though there are fallible human elements in the programming, data entry and interpretation of the programming results. Despite the broad applicability and far-reaching implications of this issue, it has not been addressed by this Court.

Computers themselves do not offer testimony. Humans do. Those persons may or may not have written the computer program that performed the analysis. They may or may not have personally entered the programming code and input data into the computer. They may only know the results of the computer analysis. Courts and administrative agencies need general guidance on when and under what circumstances this form of evidence is to be received.

Due process and fundamental fairness dictate that this relatively-new type of evidence must be subject to the closest scrutiny. It is not enough to simply offer testimony that "the computer" generated the analysis. The risk of error in the truth-finding process is overwhelming. If the truth is being sought, then, testimony about the results of computer analyses, must be constrained.

Fundamental fairness, at a minimum, requires, that before such testimony is received, the opposing parties must have access to the computer programming code, any supporting data or manuals, the input data, the format of the results and that access must provide those parties with sufficient time to examine that data and to verify that the program performs as specified. If there is no such minimal due process, then analyses by computer rise to the level of gospel truth and opposing parties must accept the results on faith. This is the very result that the Fifth Amendment is designed to abrogate.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX TO JURISDICTIONAL STATEMENT
(Volume 1 of 2)

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SUPREME COURT, STATE OF COLORADO
CASE NO. 86SA244 JULY 11, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondents-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

EN BANC

JUDGMENT REVERSED IN PART, AFFIRMED IN PART, AND CASE REMANDED WITH DIRECTIONS

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JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON concurs in part and dissents in part;
JUSTICE LOHR and JUSTICE VOLLACK join in the concurrence and dissent.

SUPREME COURT, STATE OF COLORADO
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COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

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Honorable Richard J. Brown, Acting District Judge

EN BANC

JUDGMENT REVERSED IN PART, AFFIRMED IN PART, AND CASE REMANDED WITH DIRECTIONS

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JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON concurs in part and dissents in part; JUSTICE LOHR and JUSTICE VOLLACK join in the concurrence and dissent.

These two cases concern a judgment of the Montrose County District Court which set aside orders promulgated by the Public Utilities Commission of Colorado (PUC or Commission) involving the design of electric power rates to be charged by Colorado-Ute Electric Association (Colo-Ute).

We reject Colo-Ute's claim that this appeal is moot. We further hold, contrary to the district court's order, that the PUC possessed statutory authority to determine whether the tariffs filed by Colo-Ute were just and reasonable. Moreover, the PUC's order that Colo-Ute's proposed all-energy rate should be replaced by a seasonally-differentiated demand-energy rate is supported by adequate findings of fact and substantial evidence. We do, however, affirm the ruling of the district court setting aside that portion of the PUC's order which allocated $24,084,126 of generation fixed costs to the energy component of the demand-energy rate design. Accordingly, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

I.

Colo-Ute generates and transmits electrical power on a wholesale basis to 14 member rural electrical cooperatives (co-ops), which in turn market the electrical power on a retail basis to electrical consumers. The co-ops are consumer owned and have representatives on the board of directors of Colo-Ute, a non-profit corporation.

In December 1981, Colo-Ute filed Advice Letter No. 45 with the PUC. The purpose of the filing was to increase Colo-Ute's wholesale electric power rates and thus increase annual revenue from the co-ops by approximately $11,120,603. At the time Advice Letter No. 45 was filed, Colo-Ute's pricing

scheme for its member co-ops was on a "flat" or "all-energy" rate basis.[1] This pricing method had been approved by the PUC in February 1981. To reach its desired revenue increase, Colo-Ute proposed increasing its all-energy rate by a uniform 12.157 percent.

A revised rate schedule became effective on January 15, 1982. As a result of a statutory provision adopted by the legislature in 1981, which is central to a resolution of the jurisdictional issue in this case, the Commission is without authority to suspend the effective date of tariff changes filed by cooperative electric associations. See § 40-6-111(4)(a), 17 C.R.S. (1984). The PUC, assuming that this statutory provision relating to suspension had no effect on its authority to investigate rate filings, on January 12, 1982, initiated Case No. 6076 for the purpose of investigating the reasonableness of the tariffs filed by Colo-Ute, and set the matter for hearing.

A number of parties intervened and participated in Case No. 6076. Intervening parties included the co-ops, as well as customers of the co-ops: Union Carbide Corporation, Shell Oil Company, Exxon Company, USA (Exxon), Atlantic Richfield Company (ARCO), and the City of Delta, Colorado. At the hearings, Colo-Ute and some of the co-ops presented evidence both in support of the revenue increase and in the continued use of a flat or all-energy rate. The PUC's staff offered evidence generally supporting a revenue increase, but recommended abandoning the continued use of the all-energy rate, which the staff asserted was not "cost tracking," and therefore, no longer appropriate for Colo-Ute.[2] In its place, the staff recommended a seasonally-differentiated demand-energy rate.[3] The intervening customers concurred in the recommendations of the Commission's staff.

The Commission approved the revenue increase sought by Colo-Ute. However, it disapproved the continued use of the all-energy rate, and ordered Colo-Ute to file "demand energy rates for its wholesale electric customers with seasonally differentiated demand charges and an annualized energy [charge] on a uniform kwh basis." Decision No. C83-1176.

Intervenors ARCO and Exxon, while in general agreement with the PUC's ultimate findings regarding the revenue increase and the substitution of the demand-energy rate, objected to that part of the PUC's decision which allocated over $24 million in generation fixed or demand costs to the energy component of the demand-energy rate design. Thereupon, ARCO, Exxon, Colo-Ute, and the co-ops filed application for rehearing, reargument, and reconsideration. In Decision No. C83-1392, the Commission denied the application of Colo-Ute and the co-ops and granted the application of ARCO and Exxon in part. Decision No. C83-1176 was modified as a result, but such modifications are not at issue.[4]

Colo-Ute and the co-ops sought judicial review in the Montrose County District Court. The appeal was assigned Case No. 83CV218. They challenged the authority of the PUC to commence an investigation concerning the rate increase on its own motion. They also claimed that the Commission's orders with respect to rate design were arbitrary, capricious, unconstitutional, an abuse of discretion, and not in accordance with the law and the evidence. Finally, they moved for a stay or suspension of the Commission's decisions, pending final determination by the district court of their challenge. This motion was granted.

ARCO and Exxon sought judicial review in the Denver District Court of that portion of the PUC's decisions which

allegedly had misclassified certain demand costs as energy costs. Given the similarities of the parties in the Denver and Montrose District Court actions, and the presence of common questions, the Denver District Court ordered the case transferred to the Montrose District Court, pursuant to C.R.C.P 98(f)(1), where it was assigned Case No. 84CV7. Subsequently, the court consolidated the two cases for hearing. The only issue in Case No. 84CV7 concerns the PUC's decision to shift substantial demand costs onto the energy portion of the demand-energy rate.

With respect to Colo-Ute's claims in Case No. 83CV218, the district court held, inter alia, that: (1) The PUC does not possess statutory authority, in the absence of a complaint, to investigate and modify the rate design of an electric cooperative association, such as Colo-Ute; (2) The PUC's orders concerning rate design amount to an unwarranted intrusion into the management prerogative and discretion of Colo-Ute; (3) The Commission's findings are conclusory in nature and are not supported by substantial evidence.[5] The district court thereupon set aside that part of Decision No. C83-1176 which required Colo-Ute to file rates and tariffs ordered by the Commission.

In Case No. 84CV7, the district court concurred in the arguments presented by ARCO and Exxon, finding that the decision of the Commission to allocate over $24 million of demand costs to energy costs was not supported by substantial evidence or adequate findings of fact, was arbitrary and capricious, and resulted in an unjust and discriminatory rate. The court set aside that portion of Decision No. C83-1176 which allocated $24 million of the demand costs to the energy costs and further held that if this court (supreme court) were to find lawful the Commission's imposition of the demand-energy

rate, the PUC would be directed to allocate demand-energy costs in accordance with the staff's cost-of-service study, as contained in Exhibit No. 84.[6]

On appeal the Commission raises the following issues: (1) Whether the Commission possesses statutory authority to institute on its own motion a proceeding to determine whether tariffs filed by Colo-Ute are just and reasonable; (2) Assuming that it possesses such authority, is the Commission's decision relating to rate design an unwarranted intrusion into the management prerogative of Colo-Ute, and do adequate findings of fact and substantial evidence exist to support its decision; and (3) Whether there is substantial evidence to support the findings that $24 million in generation fixed costs should be allocated to the energy component of the demand-energy rate.[7]

II.

Before considering the substantive issues raised in the appeals, we first address the claim of Colo-Ute, raised in its answer brief, that these appeals are moot and should therefore be dismissed.

In support of its position, Colo-Ute states that in October 1986, five months after the decision of the district court, it filed a new wholesale rate tariff governing electric power sales to the co-ops which became effective by operation of law on December 1, 1986. The tariff represented a 5-percent decrease in the all-energy rate it charged the co-ops. Colo-Ute contends that since the tariff supersedes the tariff which is the subject of Case No. 6076 and these appeals, the issues raised in the instant case are "purely academic." The PUC, ARCO, Exxon, and Shell Western E&P, Inc. argue to the contrary and urge us not to dismiss on the ground of mootness.

We have previously stated that a case is not moot where interests of a public nature are asserted under conditions that may be immediately repeated. Page v. Blunt, 126 Colo 324, 327, 248 P.2d 1074, 1075 (1952). Under our latest formulation of the mootness test, we have held that a case is not moot where the controversy is one "capable of repetition, yet evading review." Goeddecke v. State Dept. of Institutions, 198 Colo. 407, 410 n.5, 603 P.2d 123, 124 n.5 (1979) (quoting Roe v. Wade, 410 U.S. 113 (1973)); Star Journal Publishing Corp. v. County Court, 197 Colo. 234, 236, 591 P.2d 1028, 1029 (1979).

This case is not moot because the issue of proper rate design survives the most recent tariff filing. Colo-Ute's 1986 rate filing retains the same flat-energy rate structure which the Commission found objectionable, and which is at issue in the instant appeal. Colo-Ute may have changed the level of its rates with its most recent filing, but the level of rates has never been a matter of dispute. In fact, the issue which has given rise to these appeals -- the authority of the PUC to prescribe the demand-energy rate for Colo-Ute -- presents no less a controversy now than when the PUC first set Case No. 6076 for hearing. The lawfulness of the Commission's orders with respect to Colo-Ute's rate design remains a viable legal controversy. See New England Telephone & Telegraph Co. v. Public Utilities Comm'n, 329 A.2d 792, 806 (Me. 1974) (rejecting mootness argument based on new rate filing where important issues remain to be decided); Milwaukee & Suburban Transport Corp. v. Public Utilities Comm'n, 268 Wis. 573, 68 N.W.2d 552, 556, cert. denied, 350 U.S. 877 (1955) (controversy presented in review proceeding not moot where issue over method of computing depreciation of utility property remains a continuing controversy).

In addition, Colo-Ute's argument, if accepted, would operate to insulate much of its activity from judicial and/or Commission review. With the addition of section 40-6-111(4)(a), 17 C.R.S. (1984), the PUC no longer possesses the statutory authority to suspend the date on which a tariff filed by a cooperative electric association becomes effective. As a result, any new or revised tariff filed by a cooperative electric association such as Colo-Ute becomes effective by operation of law after the expiration of the 30-day notice period specified in section 40-3-104, 17 C.R.S. (1984). But it takes longer than 30 days for the Commission to review a rate tariff filed by Colo-Ute, to say nothing of the time necessary for an appeal of a Commission decision to work its way through the judicial system. If a cooperative could render an appeal moot merely by filing a new tariff while an appeal is pending, the Commission's authority to regulate cooperative utilities would be undermined.

Moreover, ARCO, Exxon, and Shell Western E&P, Inc. seek an order from this court directing Colo-Ute to pay refunds to customers who might have over paid under the all-energy rate scheme. Refund amounts would be based on the difference in payments made under the all-energy and demand-energy rates.

If ARCO, Exxon, and SWEPI are entitled to refunds, an issue we do not decide, this would preclude dismissing the instant case on mootness grounds. It is generally the law that claims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable. Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction Second § 3533.3 at 262 (1984). Other courts have rejected mootness claims in analogous circumstances, where, addressing the customer's complaint regarding damages, they first require

a resolution of other issues on their merits. See, e.g., Memphis Light, Gas & Water Div. v. Kraft, 436 U.S. 1, 7-8 (1978) (although injunctive relief from utility's termination of service had been mooted, customer's claim for damages saved case challenging termination procedures from the bar of mootness); Meyers v. Jay Street Connecting Railroad, 288 F.2d 356, 358 (2d Cir.), cert. denied, 368 U.S. 828 (1961).

Finally, Colo-Ute cites in support of its position Air Pollution Control Comm'n v. Colorado-Ute Electric Ass'n, 672 P.2d 993 (Colo. 1983). In that case, Colo-Ute challenged the validity of an air pollution control commission regulation setting forth conduct necessary to obtain an emission permit. Although Colo-Ute cites the case for the proposition that "when the issues in a case have been changed by subsequent events, this court has not hesitated to find that the case has been mooted," Colo-Ute has glossed over the particular facts in that case. We held in Air Pollution Control Comm'n that the question of whether the regulation had been validly adopted was moot, because the regulation had subsequently been repealed. 672 P.2d at 997. By comparison, Colo-Ute's all-energy rate is still in use and thus an issue which gave rise to the present controversy remains unresolved.

Having determined that Colo-Ute's mootness claim is without merit, we now address the substantive issues raised by this appeal.

III.

In holding that the PUC lacked jurisdiction to investigate Colo-Ute's rate filing, the district court focused upon a provision of the public utilities law which provides, in part: "Upon complaint filed by any member or customer of a

cooperative electric association or by any affected public utility, the commission shall determine whether the rate, charge, rule, or regulation in question is contrary to this section, section 40-3-106(1), or section 40-3-111." § 40-6-111(4)(a), 17 C.R.S. (1984).[8] Although the court made reference to a number of other provisions in the public utilities law granting the Commission the authority to investigate rates either upon the filing of a complaint or upon its own motion, it concluded that section 40-6-111(4)(a):

> [P]ermits that authority only upon the filing of a complaint by any member or customer of a cooperative electric association or by any affected public utility. Subparagraph (4)(a) removes the power of the PUC to suspend rates, fares, tolls, rentals, charges, classifications, practices, rules or regulations pending a hearing, and does not provide that the PUC, of its own motion, may hold such hearings.

Although other statutory provisions concern public utilities in general, the court stated that section 40-6-111(4)(a) is a "specific statutory provision relating to cooperative electric associations, and must be followed." The district court relied on a maxim of statutory construction that "where specific and general statutes conflict, the provisions of the specific statute prevail." In other words, section 40-6-111(4)(a) trumps all other provisions in the public utilities law which give the PUC the authority to investigate rates upon the filing of a complaint, or upon its own motion. The court concluded that the PUC does not have the authority pursuant to section 40-6-111(4), without complaint, to change the rate design of an electric cooperative such as Colo-Ute.

We have stated on numerous occasions that where a statute is capable of more than one interpretation, it must be construed in light of the apparent legislative intent and purpose. Among the guidelines to be considered are the ends the statute was designed to accomplish, and the consequences which would flow from an alternative construction. If separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, we should adopt that construction which results in harmony rather than that which produces inconsistency. Mooney v. Kuiper, 194 Colo. 477, 479, 573 P.2d 538, 539 (1978); Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 283, 552 P.2d 300, 303 (1976). Two statutes concerning the same subject matter are to be read together to the extent possible so as to give effect to legislative intent. Peoples Natural Gas Div. v. Public Utilities Comm'n, 698 P.2d 255, 263 (Colo. 1985). Further, we will presume that the legislature intended a just and reasonable result when it enacted a statute. Allen v. Charnes, 674 P.2d 378, 381 (Colo. 1984). See also § 2-4-201(1)(b), 1B C.R.S. (1980) ("the entire statute is intended to be effective").

The maxim of statutory construction relied upon by the district court is, however, wholly irrelevant where the specific statute itself -- section 40-6-111 -- expressly vests the PUC with authority to investigate rates, and therefore, raises no conflict with other provisions of the public utilities law. If the district court had applied proper principles of statutory construction, it would not have ignored the remainder of section 40-6-111, particularly subsection (1), and other pertinent provisions of the public utilities law, all of which confirm the Commission's power and duty to investigate tariff changes involving utilities such as Colo-Ute. The district court should have read section 40-6-111(4)(a), 17 C.R.S. (1984), together

with other relevant statutory provisions, including sections 40-6-111(1), 40-6-108(1)(b), and 40-3-102, 17 C.R.S. (1984), in light of the apparent legislative intent and purpose.

The General Assembly added subsection (4) to section 40-6-111 in 1981. See "An Act Concerning the Public Utilities Commission," ch. 482, sec. 2, § 40-6-111(4), 1981 Colo. Sess. Laws 1922-1923 [codified at § 40-6-111(4)(a), 17 C.R.S. (1981 Supp.)]. The effect of the 1981 amendment was to grant to cooperative electric associations relief from the PUC's power to suspend rates for up to 120 days pending investigation and hearing, see § 40-6-111(1)(b), without diminishing the PUC's power under existing statutes to investigate and hold hearings, whether upon complaint or on its own motion, and to enter remedial orders to carry out the purposes of the public utilities law.

As a result of the 1981 amendment, when a cooperative electric association files a tariff with the PUC, such a tariff becomes effective at the expiration of the 30-day notice period provided by section 40-3-104, 17 C.R.S. (1984). Therefore, any hearing commenced by the PUC, whether on its own motion, or upon complaint made to the PUC, pursuant to sections 40-6-101(1) or 40-6-111, does not have the effect of suspending the effective date of such tariffs. This is not the case, however, with respect to other utilities in Colorado subject to the PUC's jurisdiction. With respect to those utilities, the PUC still retains the power to suspend the effective date of such tariffs. See § 40-6-111(1)(a), (b).[9]

It was the statutory suspension power -- not the PUC's power to investigate and hold hearings -- which was abolished by section 40-6-111(4)(a) for the benefit of cooperative electric associations. These organizations had contended that the

"regulatory lag" which accompanied the investigation and hearing process made it difficult for them, because of the intervening suspension period, to be adequately compensated for the costs of inflation even if the proposed rate increase was ultimately approved in full. See Colorado-Ute Electric Ass'n v. Public Utilities Comm'n, 198 Colo., 534, 544, 602 P.2d 861, 867 (1979). The efforts of cooperative electric associations to persuade the General Assembly to grant some form of relief achieved fruition with the passage of section 40-6-111(4)(a) in 1981. See also Advice Letter No. 45 ("Under the provisions of [section 40-6-111(4)(a)], this rate filing becomes effective on thirty (30) days notice -- thereby eliminating any regulatory lag in obtaining necessary rate relief."). The statute only eases the burden on cooperative electric associations resulting from suspensions during the hearing process. It does not exempt cooperative electric associations from PUC review of tariff changes.

The court below wrongly concluded that by removing the suspension power, the legislature also intended to limit the Commission's powers to investigate tariff changes, hold hearings, and enter remedial orders. We have previously rejected the assumption that the power to investigate and hold hearings is inseparably tied to, and dependent upon, the suspension power, such that removing the power to suspend also precludes an investigation. See, e.g., Public Service Co. v. Public Utilities Comm'n, 653 P.2d 1117, 1122 (Colo. 1982) ("we decline to impose an 'all or nothing' requirement upon the commission"). Moreover, section 40-6-111(2)(a), 17 C.R.S. (1984), states that tariff changes "not so suspended" shall go into effect after the 30-day notice period "subject to the power of the commission, after a hearing on its own motion or upon complaint, as provided in this article, to alter or modify the same."[10] Traditionally, the PUC has enjoyed broad discretion in

determining whether to suspend the effective date of newly filed rates, while under investigation, or allow rates to become effective (after the statutory notice period), fully or in part, pending the outcome of an investigation.

In enacting section 40-6-111(4)(a), the General Assembly was careful to structure the amendment in such a fashion as to make the suspension powers inapplicable to cooperative electric associations, while leaving such entities subject to the other provisions of that section and the public utilities law. The statute expressly provides that "this subsection (4) shall not be construed to exempt such associations from any other provision of this section." Among those "other provisions of this section:" section 40-6-111(1), which grants the Commission the power to have a hearing concerning the propriety of a newly filed rate or changed rate, "either upon complaint or upon its own initiative . . ."; and section 40-6-111(2)(a). When the statute is read in this way -- that cooperative electric associations are exempted only from that provision relating to the PUC's power of suspension -- an interpretation is achieved which gives a harmonious and consistent effect to its various provisions.

In fact, when the last sentence of section 40-6-111(4)(a) is read in conjunction with section 40-6-108(1)(a) and (b) and section 40-6-111(1), it becomes possible to discern that not only are these provisions consistent with each other, but also that the last sentence of section 40-6-111(4)(a) lessens a requirement in section 40-6-108(1)(b) -- thereby promoting the legislative intent behind subsection (4) of easing the regulatory burden on cooperative electric associations.

Section 40-6-108(1)(b) prohibits the PUC from entertaining complaints as to the reasonableness of any rates or charges of

any public utility "except upon its own motion," or upon a complaint signed by:

> The mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the county, city and county, city, or town, if any, within which the alleged violation occurred, or not less than twenty-five customers or prospective customers of such public utility.

On the other hand, section 40-6-111(4)(a) authorizes the PUC to determine whether a rate charged is discriminatory or preferential "[u]pon complaint filed by any member or customer of a cooperative electric association or by any affected public utility . . ."

In a sense, the complaint provision incorporated in section 40-6-111(4)(a) is a counterweight to the freedom given cooperative electric associations to increase their rates without suspension. Although the legislature, by adding section 40-6-111(4)(a), terminated the authority of the PUC to suspend the effective date of a tariff filed by an electric cooperative, the members or customers of a cooperative electric association or affected public utility were given added protection in the form of an eased requirement for challenging the utility's rate increases.

The last sentence of subsection (4) states that "[u]pon complaint . . . the commission shall determine. . . ." § 40-6-111(4)(a) (emphasis added). In other words, under certain circumstances the Commission is required to investigate a tariff change. But nothing in subsection (4) can be interpreted as diminishing any of the Commission's powers under existing

law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates.[11]

Having concluded that the PUC was properly acting within the scope of its authority, we now consider whether that authority was exercised in a lawful manner.

IV.

The district court found "that the Commission's action in changing Colorado-Ute's rate design from a flat-energy rate to a seasonally adjusted demand-energy rate is an unwarranted intrusion into the management prerogatives and discretion of Colorado-Ute." Among the reasons given by the court were that in 1981 the PUC approved a flat-energy rate for Colo-Ute and no findings in Decision No. C83-1176 vitiated the 1981 order, and in the absence of evidence or findings of abuse associated with Colo-Ute's existing all-energy scheme, "the Court can only conclude that the Commission is substituting its own personal preference in managerial matters and has exceeded its statutory authority."

The adequacy of the Commission's findings will be discussed later in this opinion. Considering solely the issue of managerial discretion, it is clear that the district court erred in concluding that the Commission, in prescribing the proper rate design for Colo-Ute, overstepped the bounds of its proper authority. The setting of "just and reasonable rates," both as to level and design, goes to the very essence of the Commission's duties under the public utilities law. See § 40-3-102, 17 C.R.S. (1984). It is precisely the Commission's raison d' etre to determine and prescribe just, reasonable, non-discriminatory, and non-preferential "rates of every public utility in this state." Both statutory and case law demonstrate that rate-making, both

as to charge and design, is a vital part of the Commission's area of responsibility.

Rate-making is a legislative function. Mountain States Telephone & Telegraph v. Public Utilities Comm'n, 176 Colo. 457, 464, 491 P.2d 582, 586 (1971). Under the Colorado Constitution, art. XXV, the legislative authority in public utility matters has been delegated to the PUC. Mountain States Telephone & Telegraph v. Public Utilities Comm'n, 195 Colo. 130, 134, 576 P.2d 544, 547 (1978). As such, the PUC, in the area of utility regulation, including rate-making, has broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it. Id.; Miller Bros. v. Public Utilities Comm'n, 185 Colo. 414, 431, 525 P.2d 443, 451 (1974).

Nowhere in title 40, C.R.S., has the legislature specifically restricted the authority of the PUC in designing rates for cooperative electric associations. To the contrary, the public utilities law imposes upon the PUC no more imperative duty than to "adopt all necessary rates . . . and regulate all rates . . . of every public utility of this state." § 40-3-102. No exception is provided for cooperative electric associations. Until the General Assembly changes the law, the Commission possesses not only the power and authority, but also the duty to prescribe the rates of all utilities subject to its jurisdiction. The fact that the instant case involves rate design, as opposed to rate increase, is irrelevant for purposes of the analysis. After all, rate design, just as much as rate levels, could produce unjust, unreasonable, discriminatory, or preferential results.[12]

The district court held that the Commission can set aside a rate only where "there is a substantial showing that rate payers

are prejudiced materially . . ." and that "the rate is so unreasonable as to be detrimental to the public interest . . ."; in all other circumstances, rate design "[is] within the realm of sound management discretion of the public utility."

It is of course generally accepted that the management of the utility belongs to the company. Public Service Co. v. Public Utilities Comm'n, 653 P.2d 1117, 1123 (Colo. 1982). The PUC may not, under the guise of rate regulation, take over the management of the company. As to matters specifically entrusted to management, the PUC may not assert itself absent an abuse of managerial discretion. Id. But it has never been the law in Colorado that rate-making is solely a matter within the domain of management, such that PUC involvement is triggered only following an abuse of that discretion. Rate-making, including the designing of rates, has long been the exclusive province of the Commission. In fact, in a previous case where this court recognized that "[c]ourts and Commission should . . . in general, not succumb to the temptation of assuming the role of management," we went on to hold that "our regulatory commissions have a duty to declare the abuse and make such orders as will give to ratepayers the advantage of those economies in which management has failed to avail itself." Colorado Municipal League v. Public Utilities Comm'n, 172 Colo. 188, 203-04, 473 P.2d 960, 967 (1970).

The district court erred when it concluded that the Commission's action in ordering Colo-Ute to shift to a demand-energy rate "is an unwarranted intrusion into the management prerogatives and discretion of Colorado-Ute."[13]

We now turn to issues concerning the adequacy of the Commission's findings, and the sufficiency of the evidence to support the findings.

V.

A.

Adequacy of Commission Findings

The district court held that the "whole tenor of Decision No. C83-1176 as it relates to rate design is one of personal preference on the part of the Commission as opposed to specific findings of fact which would support a new rate design." In the court's words:

> The commission has made no such findings in any of its decisions regarding Case No. 6076, and a review of the record indicates that no such findings can reasonably be made. The bootstrap attempt to do so in Decision No. C83-1392 makes no additional findings than those contained in the original Decision No. C83-1176. Nothing in the record supports the bold faced conclusion stated by the commission on page 3 in Decision No. C83-1392 that the flat energy rate currently charged by Colorado-Ute is discriminatory, preferential, creates an advantage, or otherwise violates 40-3-106(1) or 40-3-111.

Any ultimate findings the district court was able to discern in the PUC's decisions, whether implied or stated, were critiqued

as "conclusive [sic] in nature and . . . not supported by any factual findings based on the record."

The standard for judicial review of the Commission's decisions is governed by section 40-6-115(3), 17 C.R.S. (1984), which provides:

> (3) Upon review, the district court shall enter judgment either affirming, setting aside, or modifying the decision of the commission. So far as necessary to the decision and where presented, the district court shall decide all relevant questions of law and interpret all relevant constitutional and statutory provisions. The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the decision under review violates any right of the petitioner under the Constitution of the United States or the State of Colorado, and whether the decision of the Commission is just and reasonable and whether its conclusions are in accordance with the evidence.

We have held that this statutory provision limits the court's review of PUC decisions to a determination of whether the PUC has regularly pursued its authority, whether its conclusions are supported by findings of fact based upon adequate evidence, and whether the Commission has reached its decisions by applying the appropriate constitutional and legislative standards. Ram Broadcasting of Colorado, Inc. v. Public Utilities Comm'n, 702 P.2d 746, 750 (Colo. 1985);

Public Utilities Comm'n v. Northwest Water Corp., 168 Colo. 154, 169, 451 P.2d 266, 273-74 (1969).

We have long held that the factual determinations of an administrative body such as the PUC are entitled to considerable deference. G&G Trucking Co. v. Public Utilities Comm'n, 745 P.2d 211, 216 (Colo. 1987). After all, a reviewing court, since it is without the assistance of a staff, and the expertise of the Commission, should not undertake to duplicate the evaluation and judgment processes followed by the PUC in arriving at its decision. Morey v. Public Utilities Comm'n, 629 P.2d 1061, 1068 (Colo. 1981); Atchinson, Topeka & Santa Fe Railroad Co. v. Public Utilities Comm'n, 194 Colo. 263, 267, 572 P.2d 138, 141 (1977). It is peculiarly within the province of the PUC to decide what weight should be accorded the evidence and to choose among conflicting inferences that may reasonably be drawn from that evidence. G&G Trucking, 745 P.2d at 216; Acme Delivery Service v. Cargo Freight System, 704 P.2d 839, 843 (Colo. 1985). When two equally reasonable courses of action are open to the Commission, the reviewing court should not substitute its judgment for that of the Commission in selecting the appropriate alternative. City of Montrose v. Public Utilities Comm'n, 629 P.2d 619, 623 (Colo. 1981). A reviewing court's function is limited to determining whether substantial evidence exists in the record to support the PUC's determinations. If not, the Commission's order must be set aside. If so, the judicial inquiry is at an end, for the reviewing court is not permitted to substitute its judgment for that of the Commission. G&G Trucking, 745 P.2d at 216.

Findings by the Commission need not be presented in any particular form, and a necessary finding may be implied from other findings made. Caldwell v. Public Utilities Comm'n, 200

Colo. 134, 138, 613 P.2d 328, 332 (1980); Aspen Airways, Inc. v. Public Utilities Comm'n, 169 Colo. 56, 62, 453 P.2d 789, 792 (1969). Where the Commission purports to make such findings, they must be discernible to the reviewing court. Caldwell, 200 Colo. at 138, 613 P.2d at 332. Further, findings of fact by the Commission must show which evidence it accepts as competent and worthy of belief, and that which it rejects. Id.; Aspen Airways, 169 Colo. at 62, 453 P.2d at 792. Based upon these standards we are satisfied that the Commission's conclusions are supported by adequate findings of fact.

Examination of Decision Nos. C83-1176 and C83-1392 reveals that the Commission's findings are adequate to support its ultimate conclusion that the all-energy rate is no longer appropriate for Colo-Ute and should be replaced in favor of the demand-energy rate. It found, based upon the evidence presented, that Colo-Ute's member distribution cooperatives exhibit a high coincidence of peak demand with the Colo-Ute system peak demand;[14] that Colo-Ute's "total cost per unit of output has varied monthly," contrary to Colo-Ute's position that the all-energy rate and its resource management plan have resulted in a uniform cost per unit of output on a monthly basis; and that the Colo-Ute system is characterized by a "definite surplus of base load capacity at certain times which indicates that Colo-Ute has not achieved uniform loading of capacity throughout the day. This condition results in an uneconomic under-utilization of capacity."

With respect to Colo-Ute's resource management plan, the PUC found that it was not effective in that it contributed to growth in peak demands. Further, Colo-Ute's load curve is not flat; Colo-Ute has not been able to make non-member sales to fill in the valleys of its load; its load factor has deteriorated in

recent years; and given likely economic prospects in the near and long-term, it is not expected that Colo-Ute will be better able "to sell energy to non-members so as to use its plants more efficiently." Also, significantly increased expenses associated with Colo-Ute's purchase of power from other utilities to meet peak demand, and the fact that Colo-Ute is "unable to meet its valleys on its system, indicate that its resource management plan and associated flat-energy rate are not working to the benefit of its ratepayers." The PUC then found that since Colo-Ute's total cost of generating a kilowatt hour is not uniform over time "it follows that a flat or uniform energy rate is not cost tracking," and the all-energy rate provides a distorted price signal to member systems.

In support of its adoption of the demand-energy rate, the PUC found that a demand-energy rate is appropriate for a utility whose members exhibit a high coincidence of peak demand with the system peak; that as much as two-thirds of Colo-Ute's costs are capital related; that the demand-energy rate, premised as it is upon the separate and distinct recognition of the two major cost components of producing electricity, capital and fuel, provides a more accurate price signal than the all-energy rate, and more directly tracks costs than an all-energy rate, as it "assigns costs more directly to the cost causer"; that the wholesale customers of Colo-Ute are capable of comprehending a demand and energy rate with a fixed customer charge; and that the demand-energy rate is the most cost tracking rate for the wholesale power charges of Colo-Ute.

One of the fundamental principles of electric power rate design is that rates charged should accurately reflect the utility's actual cost of providing service, including both capital costs and operating expenses. We have held that the "PUC

must therefore set rates which protect both: (1) the right of a public utility company and its investors to earn a rate of return reasonably sufficient to maintain the utility's financial integrity; and (2) the right of consumers to pay a rate which accurately reflects the cost of service rendered." Public Service Co. v. Public Utilities Comm'n, 644 P. 2d 933, 939 (Colo. 1982).

Here, inasmuch as the Commission has made specific findings establishing that the all-energy rate currently in place is less able to track the cost of service than a demand-energy rate, the Commission has complied with the statutory requirement of determining whether the rate charged is violative of sections 40-3-106(1) or 40-3-111.[15]

The court below erred when it concluded that "these findings . . . are conclusive [sic] in nature and are not supported by any factual findings based on the record." To the contrary, the Commission's findings, whether explicitly stated or implied, comply with statutory requirements that findings be made. Moreover, these findings are adequate to support the Commission's ultimate conclusions regarding Colo-Ute's rate design.

B.

Substantial Evidence

The district court held that "[t]he record does not support the conclusions reached by the PUC as to the applicability of the demand-energy rate to the Colorado-Ute system." Further, "[i]n short, there does not appear to be sufficient competent evidence for the Commission to conclude that either the demand-energy rate is most appropriate for Colorado-Ute because of the high degree of coincidence of peaks, nor [sic]

that the demand-energy rate is the most cost tracking rate available for Colorado-Ute."

The standard of substantial evidence requires more than merely "some evidence in some particulars" to support the Commission's decision. Home Builders Ass'n of Metropolitan Denver v. Public Utilities Comm'n, 720 P.2d 552, 562 (Colo. 1986); Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1308 (Colo. 1986). Review of the record satisfies us that there is substantial evidence to support the Commission's ultimate conclusions that (1) the demand-energy rate is the most cost tracking rate for the wholesale power charges; and (2) "Colorado-Ute [should] file demand-energy rates for its wholesale electric customers with seasonally differentiated demand charges and an annualized energy on a uniform kilowatt basis as hereinafter ordered." Without discussing all of the evidence in detail, we will refer to the most significant presentations put before the Commission.

The Commission heard testimony from Dr. William Loehr, professor of economics and expert in the area of rate design. Loehr testified that "rates should track costs as closely as possible." Further, to properly reflect costs, "rates should be based theoretically upon marginal costs," i.e., the social costs of increasing or decreasing the supply of that commodity. Since the calculation of marginal costs for utilities is difficult, however, Loehr testified that "[t]he direct application [to utilities] of marginal cost pricing is often not practical."

Rates based upon separate charges for demand and energy costs, or demand-energy rates, recognize that there are two major components to the cost of producing energy: (1) fixed capital expenses associated with the generation and transmission of electricity (demand costs); and (2) variable operating and

maintenance expenses consisting primarily of fuel costs (energy costs). In Colorado, utilities, particularly Colo-Ute, predominantly use coal-fired plants. Therefore, fuel costs represent the cost of coal, which is low in comparison with oil or gas. Capital costs, however, tend to be relatively high, since it is more costly to build coal-fired facilities than oil or gas-fired ones. All utilities face trade-offs among costs. Loehr testified that "the trick for utilities is, over the long run, to choose that combination of capital . . . and fuel costs which together imply minimum total cost."

An exhibit sponsored by the president of Colo-Ute, for example, revealed that "[of] the total costs that must be recovered by [Colo-Ute], approximately two-thirds are associated with the cost of capital and one-third with the cost of fuel and purchase power." In effect, Colo-Ute has "incurred the high capital cost of coal-fired generation units to take advantage of low fuel costs."

The Commission staff's cost-of-service study, which was uncontroverted, and which was the only cost-of-service study offered, also demonstrates that Colo-Ute incurs these two types of costs, demand and energy, in supplying electricity. The cost-of-service study also indicates that approximately 56 percent of Colo-Ute's costs are fixed capital (demand) costs, and the remaining 44 percent are fuel and similar variable (energy) costs.

Loehr testified that since capital is the predominant element in Colo-Ute's costs, it should be reflected in Colo-Ute's rates. For this reason, a demand charge should be a part of Colo-Ute's rate structure. This demand charge would be designed to "track," or recover, that proportion of total cost representing capital cost. Accordingly, Colo-Ute's rates must include both

demand charges, to recover fixed capital costs, and energy charges, to recover the cost of fuel and other variable expenses. Further, it was Loehr's position that these two costs should be segregated, and billed separately to each customer. If not, the utility's customers receive a distorted price signal, and do not pay a rate that tracks the actual cost of providing electric service.

The rationale behind the demand charge, as explained by Loehr, is that through such a charge, Colo-Ute's customers, i.e., member systems, can be charged directly for their share of the use of the Colo-Ute system's facilities. "[A]s the system grows, members must choose whether or not to place increasing demands upon that system. Increased demands on the system imply additional commitments of capital resources. [Colo-Ute] members should face a rate structure which reflects the cost of the capital resources that they will force [the Colo-Ute system] to incur should they choose to increase demand."

Other witnesses, including Warren L. Wendling, a public utilities engineering analyst, offered testimony in which they recommended that Colo-Ute adopt a seasonally-differentiated demand-energy rate. Among the advantages cited were: (1) Demand-energy rates provide an incentive to customers to adjust their consumption pattern so that the total costs to them are lowest and marginal costs of the system are lowest; (2) the system would be deferring capital investments in generation and transmission plants; and (3) other benefits lie in reduced capacity purchases on peak or for reserve requirements, and in reduced operation and maintenance costs.

Moreover, the witnesses testified that any demand charges should be seasonally differentiated, since the Colo-Ute system peaks in the winter time, not in the summer time. The staff's

analysis based on an adjusted total cost-of-service shows a significant disparity between the system's summer and winter season costs (the summer figure is 34.545 mills per kwh; the winter figure is 42.625 mills per kwh). Growth in peak demand in winter is the type of growth which causes the system to incur additional capital expenditures. "A higher demand charge in winter than in summer should be used to signal [Colo-Ute] members that their winter peak consumption places constraints upon the capacity of the system."[16]

When asked their opinions of the all-energy rate as proposed by Colo-Ute, the rate design specialists attacked such a scheme as failing to track costs, and therefore, failing to properly reflect the costs of service. In Lochr's words:

> I do not believe the flat energy rate to be based upon sound principles and therefore I cannot recommend it. The flat energy rate is constructed as if the only cost of generating and supplying electricity were fuel costs. Since fuel costs are only a small part of total costs, a flat energy rate conveys a distorted price signal. As I mentioned before, the main costs are the costs of capital. A flat energy charge conveys a signal to the members and their ultimate customers to conserve energy. It conveys no signal related to how they conserve energy. If energy conservation occurs during off peak periods, but energy use remains high during peak periods, the system will still have to incur the costs of capacity to provide power on peak, yet use that capacity less during off peak periods. The result of this would be that capacity costs would have to be spread over

> fewer kwh and the average price per kwh would have to rise.

Wendling, when asked whether Colo-Ute's flat-energy rate is a "just and reasonable rate," responded that the flat-energy rate "does not reflect how a utility is planned, constructed nor operated. The rate does not track costs to cost causers. Therefore the rate is not just."

The record indicates additional evidence regarding the Colo-Ute system's load factor and coincidence of member peak demands with system peak demands, both of which underscore the failings of Colo-Ute's all-energy rate structure, and the beneficial results which would accompany the introduction of the demand-energy rate structure.

Colo-Ute witness Krumins contended that "the combination of a flat energy rate and Colorado-Ute's resource management plan have resulted in a uniform cost per output on a monthly basis, the operation of generation units at full capacity and a flat load curve." In fact, an exhibit sponsored by Krumins, "makes it clear that during the test year total costs varied from 3¢/kwh in January to 4.3¢/kwh in October, a 1.3¢/kwh difference (or 43 percent); by 1982, the total cost varied from 3¢/kwh in January to 4.5¢/kwh in June, a difference of 1.5¢/kwh (or 50 percent)." On the basis of these figures, the Commission concluded "from Colo-Ute's own evidence that the total cost per unit of output has varied monthly." Further, since Colo-Ute's total costs of generating a kwh are not uniform over time, "it follows that a flat [or all] energy rate is not cost tracking."

Finally, the Commission heard testimony regarding the coincidence of peak demands within the Colo-Ute system.

After noting that "[t]he commission relied heavily upon Exhibit 94 in an attempt to show a high coincidence between the system's peaks and the members' peaks," the court below remarked that "that exhibit does not appear to accurately track all of the data available to determine coincidence of peaks." Further, the exhibit "shows that the peaks are not nearly as coincident as believed by the commission." The Commission's findings on this issue, however, are also supported by substantial evidence.

Among other pieces of information, Exhibit 94 documents the dates, times, and monthly peak demands for Colo-Ute and its co-op members during the period from November 1980 through October 1981. Working with this data, Mitchell, a staff witness, testified that during February 1981, which is the highest peak load month of Colo-Ute's system during the test year, 8 of the 10 members documented peaked during the top 5 percent of peak hours of the entire Colo-Ute system. The exhibit further demonstrates that in February 1981, the 14-member coincidence peak as a percentage of the maximum demand for the system as a whole was 96.18 percent, and, in fact, for the entire test year, in only two months did this figure drop below 90 percent. Moreover, for all months of the test year the Colo-Ute members had individual peaks which were highly coincident with the Colo-Ute system peak. Further, another exhibit submitted by Colo-Ute, and which indicates that 9 of the 14 members exhibited a coincidence in excess of 90 percent, similarly demonstrates the high coincidence of member demands with the system peak.

The significance of all this for rate design is that the Commission heard testimony that "[i]n cases where peak demands tend to be highly coincident, a demand-energy rate is appropriate."

This evidence regarding peak demands is more than sufficient to support the Commission's findings on this issue. In ignoring or casting aside Exhibit 94, the court below exceeded the proper standard of judicial review.

The evidence put forth by Colo-Ute and the Commission staff to support or challenge the propriety of the all-energy rate design was in dispute. Given the conflicting nature of the evidence, alternate conclusions could have been reached. All this establishes is that the Commission performed its duty by resolving these disputed issues of fact in favor of the demand-energy rate. The court may have disagreed with these findings on disputed questions of fact, but it is not within the province of the district court to substitute its judgment for that of the PUC on disputed questions of fact. Answerphone, Inc. v. Public Utilities Comm'n, 185 Colo. 175, 178, 522 P.2d 1229, 1230 (1974).

Substantial evidence supports the Commission's adoption of the seasonally-differentiated demand-energy rate. The district court's rejection of the Commission's findings constitutes an impermissible intrusion into the PUC's rate-making process. Accordingly, the order of the district court in Case No. 83CV218 is reversed.

VI.

Finally, we consider the issue raised in Case No. 84CV7. In that case, two customers of the co-ops, ARCO and Exxon (ARCO/Exxon), sought review of that portion of the Commission's decision which allocated over $24 million of generation fixed costs (demand costs) to the energy component of the demand-energy rate.

The evidentiary basis for the allocation was provided by Wendling who testified that electric utilities, in an effort to operate in the most economical manner, construct a mixture of base-load, intermediate, and peaking power plants. Base-load plants (usually either coal or nuclear) are designed to run 24 hours a day and are characterized by high capital costs and low operating costs, whereas peaking plants (usually oil-fired or gas-fired) are designed to be operated for short periods of time, and are characterized by low capital costs, but high operating costs.

Wendling was of the opinion that with respect to generating costs only, there should be a recognition of a utility's greater investment in a generating plant able to burn coal:

> A utility can minimize its investment in a generation plant by constructing oil or gas fired generators. However, a fuel cost penalty is increased. On the other hand a utility may expend more capital and build a coal fired unit and burn a lower price fuel. Therefore, this additional investment should be recovered in the energy charge.

He testified that one method used by utilities to address capacity problems resulting from a utility's greater investment in higher capital cost generation is the adoption of a time-of-day rate, which recognizes the use of capacity at the time it occurs.[17] He noted that a number of obstacles stood in the way of Colo-Ute's adoption of a time-of-day rate, including the increased complexity of metering and billing, and the need to perform cost allocation studies for the distribution cooperatives. Wendling conceded that the PUC staff had failed to request the

data necessary to formulate or propose such a rate for Colorado-Ute.

As a surrogate for this time-of-day rate which he believed appropriate for the Colo-Ute system, and to compensate for the recognized insufficiencies regarding time-of-day rate data, Wendling proposed a modification of the basic demand-energy rate. This surrogate would be created by shifting to the energy component of the demand-energy rate $24,084,126 of demand costs representing the "average" portion of the "average and excess demand (AED)" allocation.[18]

Wendling testified that since the average demand component of the AED allocation is analogous to the base-load portion of generating capacity -- the costs of which are recovered through the energy charge under time-of-day rates -- the average demand component should, therefore, be recovered in the energy charge. As the Commission described this modification: "Mr. Wendling testified that for the Colorado-Ute system, the amount so calculated approximated very closely the dollars of base-load generation that would have been spread to all hours by a time of use rate." For Colo-Ute this average demand component, i.e., the $24 million in demand-related costs, is a surrogate for the cost of base-load generation.

In effect, the allocation of $24 million in generated fixed (capital) costs to be recovered under the variable (operating) costs is a recognition of the fact that Colo-Ute, because it had constructed only coal-fired base-load plants, was using such plants to meet its peak, and therefore, was substituting capital costs for operating costs in its operations. As a result of this allocation, member cooperatives would be charged the same

rates as if Colo-Ute had originally constructed the "correct" mixture of plants.

Relying exclusively on the time-of-day surrogate approach, the Commission concluded that the revenue requirement associated with base-load generation should be transferred to the energy charge, and only the excess portion of the AED allocation should be collected in the demand charge. The Commission determined that placing only the excess portion of the AED allocation in the demand charge would provide an automatic incentive for Colo-Ute to improve its system load factor, since: "The higher the load factor becomes, the higher is the proportion of generation costs collected in the energy charge and the lower is the demand charge. This provides the incentive to maintain and improve the system load factor that was absent in the flat energy rate."

Because the court found that "there was no technical literature to support this classification and that the witness had conducted no research or studies which would support this misclassification," it concluded that the Commission's decision was not supported by substantial evidence and was arbitrary and capricious.

Next, the district court concluded that the Commission failed to make adequate findings of fact to support its classification of certain demand costs as energy costs. "[T]here was no finding nor evidence which suggested how the shift of the [$24 million] corresponded to the premise," i.e., Colo-Ute's needing a greater investment of capital than that generally needed for oil or gas plants.

Finally, the court held that the PUC rate is discriminatory and establishes a preference because it requires a high-load

customer to subsidize a low-load customer, and summer users to subsidize winter users. It reasoned that the shift of demand cost to energy cost, which is contrary to the Commission's own cost-of-service study, results in an unjust and discriminatory rate in violation of section 40-3-106.

The district court set aside that portion of the Commission's order which allocated over $24 million in demand cost to energy cost. Further, the court ruled that if the supreme court were to set aside the district court's order in No. 83CV218, and, in effect, uphold the Commission's adoption of the demand-energy rate design, then the Commission would be directed to adopt rates based upon the staff's cost-of-service study as set forth in the record.

A.

As noted above, section 40-6-115(2) and (3) limits the district court to a narrow scope of review. Part of this review includes determining whether the Commission's findings of fact are based upon substantial evidence. Ram Broadcasting of Colorado, 702 P.2d at 750. Our review of the record indicates that the Commission's decision to shift $24 million in demand cost to the energy component of the demand-energy rate is not supported by substantial evidence.

After the Commission concluded, based upon the cost-of-service study, that the seasonally-differentiated demand-energy rate is necessary and appropriate for Colo-Ute, it disregarded the rates dictated by that same cost-of-service study and classified certain demand costs as energy costs in the rates finally adopted. Although the cost-of-service study revealed that 56 percent of Colo-Ute's costs were demand related and 44 percent energy related, the Commission then adopted

Wendling's recommendation to transfer a substantial amount of Colo-Ute's demand costs to the energy component of the rate, thereby assigning ultimately 32 percent of the utility's costs to the demand component, and 68 percent to the energy component. This change represents a shift from demand to energy of approximately 24 percent of the utility's actual costs.

During the hearing, Wendling testified that a time-of-day rate could not be properly calculated without further data, and that he had not asked Colo-Ute for off-peak demand billing data so that he could actually prepare a time of use seasonally-differentiated rate. He also stated that the surrogate-time-of-day rate adopted by him was without support in the Commission staff's own studies, in outside research, or in the technical literature. The following exchange which occurred during his cross-examination is instructive:

> QUESTION: And again, what is your authority, if there is any authority for such an assumption?
>
> ANSWER: I don't believe I have an authority.
>
> QUESTION: Okay. Have you done any --
>
> ANSWER: Other than myself.
>
> QUESTION: -- research on the development of the AED allocation factor that supports this?
>
> ANSWER: No.

> QUESTION: Can you give any reference in technical literature that you are familiar with which indicates that, where the AED method is characterized as being a proxy for base-load and peaking generation?
>
> ANSWER: Well, my previously referred to work papers on the time-of-day design did that.
>
> QUESTION: But as far as technical literature which might support that approach, can you refer me to anything which parallels your recommendation?
>
> ANSWER: I can't.

When Wendling was asked whether the approach he was recommending has ever been advocated by the Commission in other rate cases, he responded: "Well, it might have been but I am not familiar with them or what their intent was, or for what purposes they were advocated."[19]

Viewing the record as a whole, and in a light most favorable to the Commission, G&G Trucking, 745 P.2d at 216; Home Builders Ass'n, 720 P.2d at 560, we conclude that Wendling's unsupported opinion does not constitute substantial evidence necessary to uphold the decision of the Commission.[20] Home Builders Ass'n, 720 P.2d at 562-63.

B.

We have held that where an order of the Commission is issued solely as a matter of administrative convenience, or in the absence of sufficient investigation into pertinent

considerations, the order is arbitrary, capricious, and invalid. City of Montrose v. Public Utilities Comm'n, 197 Colo. 119, 123, 590 P.2d 502, 505-06 (1979) (commission's order arbitrary and capricious, where no study commissioned regarding cost-of-service breakdown, although study was feasible, and no discussion in commission's order of disparate service cost; therefore, order issued solely as a matter of administrative convenience). Further, orders of the Commission which are arbitrary and capricious must be set aside. Peoples Natural Gas Div. v. Public Utilities Comm'n, 698 P.2d 255, 265 (Colo. 1985); Colorado Municipal League v. Public Utilities Comm'n, 687 P.2d 416, 419 (Colo. 1984). See also Federal Trade Comm'n v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970) (adoption of significant policy change without sufficient study and explanation is arbitrary and capricious).

The same factors which cause us to conclude that the Commission's conclusions are not supported by substantial evidence, also lead us to find this portion of the Commission's decision arbitrary and capricious. The proposed shift to demand costs represents little more than an ad hoc and unsupported analytical shortcut invented and adopted simply because the necessary rate design studies had not been performed by the Commission staff. The evidence clearly shows that such a study was entirely feasible, had the staff collected the necessary data. The district court, therefore, was fully justified in holding that this portion of the Commission's order was arbitrary and capricious.

C.

As noted above, section 40-6-109(3) imposes on the Commission the requirement that a reported decision shall be accompanied by findings of fact. Moreover, section 40-6-

111(4)(a) obliges the Commission to determine whether the rate or charge issue violates sections 40-3-106(1) and -111. The factors relied upon by the Commission must be sufficiently clear to enable the court to engage in meaningful review of the Commission's decision. Caldwell v. Public Utilities Comm'n, 200 Colo. 134, 138, 613 P.2d 328, 332 (1980).

The Commission justified its decision to shift demand costs on the grounds that Colo-Ute makes use of coal-fired power plants which require a greater investment of capital than is needed for oil or gas facilities. The Commission failed to find, however, that the specific amount of demand costs shifted to the energy charge accurately corresponds to the incremental additional capital costs of coal plants in comparison with oil or gas facilities. Indeed, the Commission could not have made such a finding since no evidence was presented on this point.

We hold that the Commission failed to conform to the statutory requirements that its reported decisions be accompanied by adequate findings of fact.

D.

Finally, section 40-3-102 imposes upon the Commission a duty to prevent unjust discrimination in rates. Further, section 40-3-106(1) recognizes that such discrimination may manifest itself in a number of ways. We have previously held that one of the primary purposes of the Commission's regulatory scheme is "to insure that the rates charged are not excessive or unjustly discriminatory." Cottrell v. City & County of Denver, 636 P.2d 703, 711 (Colo. 1981).

ARCO and Exxon have alleged that the rate design ultimately approved by the PUC, with its accompanying shift

in demand costs, unlawfully discriminates in two ways: (1) It establishes a preference for winter users and, in effect, requires summer users to subsidize winter customers; and (2) creates a preference in rates for low-load factor customers at the expense of high-load factor customers, who would then pay excessive rates to subsidize preferred customers.

We need not resolve these claims, however, as the Commission's errors mandate that this portion of Decision No. C83-1176 be set aside.

In summary, we reject Colo-Ute's claim that this appeal is moot. We hold that the PUC possessed statutory authority to institute, on its own motion, Case No. 6076, to determine whether the tariffs filed by Colo-Ute were just and reasonable. The Commission's order that Colo-Ute adopt a seasonally-differentiated demand-energy rate is supported by adequate findings of fact and substantial evidence. We affirm the ruling of the district court setting aside that portion of the PUC's order which classified over $24 million of demand costs as energy costs.

Accordingly, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

JUSTICE ERICKSON concurs in part and dissents in part; JUSTICE LOHR and JUSTICE VOLLACK join in the concurrence and dissent.

1

The flat or all-energy rate does not differentiate between "demand" charges (fixed capital costs associated with the generation and transmission of electricity) and "energy" charges (variable operation and maintenance expenses, especially fuel costs). Instead, it recovers all costs -- both demand and energy -- from a uniform charge per kilowatt hour (kwh).

2

"Cost tracking" simply means that the rates charged for public utility service must "track" actual costs; in other words, the utility should accurately assign actual costs to the consumers who are causing those costs. Ideally, the rate schedule should be designed in such a way that the consumers receive accurate and clear price signals from the utility and adjust their economic behavior accordingly.

3

Under a seasonally-differentiated demand-energy rate, an electric utility charges its customers a rate which reflects separate charges for demand and energy costs. Such a demand-energy rate provides separate and distinct recognition to the two major cost components of producing electricity: capital and fuel. Seasonal differentiation refers to the imposition of different demand charges for summer and winter, reflecting the greater power load burdens placed on generating facilities during the winter months.

4

ARCO, Exxon, Colo-Ute, and the co-ops thereupon filed new applications for rehearing, reconsideration, and reargument of Decision No. C83-1392. Colo-Ute also filed a motion to stay the filing date for rates and tariffs under Decision Nos. C83-1176 and C83-1392. In Decision No. C83-1561, the PUC denied the applications and Colo-Ute's motion.

5

The district court found for the Commission on certain constitutional and administrative due process claims raised by Colo-Ute. It held that the Commission's procedures did not violate the Colorado Open Records Act, §§ 24-72-101 to -309, 10 C.R.S. (1982), or the due process clauses of the United States and Colorado Constitutions. Colo-Ute has not raised these claims on appeal.

6

A cost-of-service study is a generally recognized approach for allocating a utility's various fixed and variable costs based upon a utility's actual costs of service.

7

The PUC urges reversal of the district court's order. Colo-Ute and the co-ops request dismissal on mootness grounds, or, in the alternative, to affirm the order. Intervenors ARCO, Exxon, and Shell Western E&P, Inc. (SWEPI) (the successor in interest to Shell Oil Company), urge reversal of the district court's order on the jurisdictional issue and on the question of whether substantial evidence exists to support the rate design change promulgated by the PUC. On the issue of allocation of demand charges as energy charges, ARCO and Exxon request affirmance of the district court's order.

8

In its entirety, section 40-6-111(4)(a), 17 C.R.S. (1984), reads as follows:

> The provisions of this section relating to suspension of rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations pending the hearing and decision thereon shall not apply to cooperative

electric associations, but this subsection (4) shall not be construed to exempt such associations from any other provision of this section. Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of section 40-3-106(1) or section 40-3-111. Upon complaint filed by any member or customer of a cooperative electric association or by any affected public utility, the commission shall determine whether the rate, charge, rule, or regulation in question is contrary to this section, section 40-3-106(1), or section 40-3-111.

9

Section 40-6-111(1)(a), (b), 17 C.R.S. (1984), reads as follows:

Hearing on schedules - suspension - new rates - rejection of tariffs.

(1)(a) Whenever there is filed with the commission any tariff or schedule stating any new or changed individual or joint rate, fare, toll, . . .the commission has power, either upon complaint or upon its own initiative, . . . but upon reasonable notice, to have a hearing concerning the propriety of such rate, fare, toll, . . . if it believes that such a hearing is required and that such rate, fare, toll, . . . may be improper.

(b) Pending the hearing and decision thereon, in the case of a public utility other than a rail carrier, such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation shall not go into effect; but the period of suspension of such rate, fare, toll, . . . shall not extend beyond one hundred twenty days beyond the time when

> such rate, fare, toll, . . . would otherwise go into effect unless the commission, in its discretion, and by separate order, extends the period of suspension for a further period not exceeding ninety days.

10

Section 40-6-111(2)(a), 17 C.R.S. (1984), provides in pertinent part:

> If a hearing is held thereon, whether completed before or after the expiration of the period of suspension, the commission shall establish the rates, fares, tolls, . . . proposed in whole or in part, or others in lieu thereof, which it finds just and reasonable. . . . All such rates, fares, tolls, . . . not so suspended, on the effective date thereof, which in the case of a public utility other than a rail carrier, shall not be less than thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant,shall [sic] go into effect and be the established and effective rates, fares, tolls, . . . subject to the power of the commission, after a hearing on its own motion or upon complaint, as provided in this article, to alter or modify the same.

11

In its answer brief, Colo-Ute provides us with the legislative history of H.B. 1441, the 1981 amendment eventually codified at section 40-6-111(4)(a). This information does not support Colo-Ute's position. In fact, some of the legislative history actually supports the position of the PUC. Governor Richard D. Lamm's message accompanying H.B. 1444 is instructive on this point:

> It [H.B. 1444] will allow REA rate increases to go into effect after 30 days from the time they are filed with the PUC, thereby eliminating costly delays presently incurred because of the lengthy hearing procedure. Should a complaint concerning the reasonableness of an increase occur, H.B. 1444 stipulates that only one complainant is necessary to require the PUC to review the new rate: Under existing law, 25 customers or prospective customers must complain before the PUC can intercede. . . . While streamlining the bureaucratic process for the rural electric cooperatives in rate setting, this legislation does not eliminate PUC control of facility development or other consumer protections.

H.R.J. 2309, 53rd Leg., 1st Sess., 1981 Colorado (emphasis added).

12

For decisions of other jurisdictions holding that their state's PUC possesses the power and authority to regulate rate design, see, e.g., Rhode Island Chamber of Commerce Fed'n v. Burke, 443 A.2d 1236, 1237 (R.I. 1982) (commission had authority to modify rate design submitted by electric utility); Central Main Power Co. v. Public Util. Comm'n, 416 A.2d 1240, 1247 (Me. 1980) (commission acted properly in regulating rate design proposal submitted by utility); Cascade Natural Gas Corp. v. Davis, 28 Ore. App. 621, 560 P.2d 301, 304 (1977) (authority to impose rate design different from that proposed by the utility is encompassed in statutory authority of commissioner to look after the interest of the utility's customers, to obtain a fair and reasonable rate and guard against discriminatory exactions).

13

The district court also held that it could discover "no findings in Decision C83-1176 which vitiates [sic] these findings previously made by the Commission [in C81-373, in which the Commission in 1981 approved an all-energy scheme for Colo-Ute]." The adequacy of the Commission's findings are discussed, infra. To the extent that the court below is imposing upon PUC decision-making the applicability of stare decisis principles, it is in error. We have held that:

> Because of the legislative character of rate-making, the Commission is not bound by its prior decisions or by any doctrine similar to stare decisis. Moreover, while consistency in administrative rulings is considered essential, and while agency rulings are entitled to great weight in subsequent proceedings . . . the appearance of arbitrariness is dispelled when new findings are made, as they were here, on the basis of new evidence and a new record.

Colorado-Ute Electric Ass'n v. Public Util. Comm'n, 198 Colo. 434, 540-41, 602 P.2d 861, 865 (1979) (citation omitted). See also B&M Service, Inc. v. Public Util. Comm'n, 163 Colo. 228, 232, 429 P.2d 293, 295 (1967) (doctrines of stare decisis as well as equitable estoppel are generally held not to apply to the determination of administrative tribunals).

14

The term "peak demands" refers to the maximum rate of customer electricity consumption (in kilowatts) occurring during a 15 or 20-minute interval for any given month. The term "coincidence of peak demands" expresses a relationship between a customer's and system's peak demands for a particular point in time.

15

Section 40-3-106(1)(a), 17 C.R.S. (1984), provides as follows:

> **40-3-106. Advantages prohibited - graduated schedules.** (1)(a) Except when operating under paragraph (b) of this subsection (1), no public utility, as to rates, charges, service, or facilities, or in any other respect, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any respect, either between localities or as between any class of service. The commission has the power to determine any question of fact arising under this section.

Section 40-3-111(1), (2), 17 C.R.S. (1984), provides in pertinent part:

> **40-3-111. Rates determined after hearing.**
> (1) Whenever the commission, after a hearing upon its own motion or upon complaint, finds that the rates, tolls, fares, . . . demanded, observed, charged, or collected by any public utility for any service, . . . or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, . . . are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, . . . the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, . . . to be thereafter observed and in force and shall fix the same by order. In making such determination, the commission may consider . . . factors which may affect the sufficiency or insufficiency of such rates, fares, tolls, . . . during the period the same may be in effect and may consider any

> factors which influence an adequate supply of energy and any factors which encourage energy conservation.
>
> (2) The commission has the power, after a hearing upon its own motion or upon complaint, to investigate a single rate, fare, toll, . . . or the entire schedule of rates, fares, tolls, . . . of any public utility; and to establish new rates, fares, tolls, . . . in lieu thereof.

16

Additional fuel is required as additional electric energy is consumed. A component of the electric power rates reflecting additional fuel costs is, therefore, also in keeping with the principle that rates should track costs.

17

A time-of-day rate varies the price of demand and/or energy over the hours of the day. Such a rate attempts to signal to customers the various costs associated with generating electricity throughout various periods of the day.

18

The "average and excess demand (AED)" allocation is a method used for allocating demand-related costs. It allocates a portion of the demand-related costs on the basis of "average" demand (kilowatt hour usage throughout the year) and the remainder of the demand-related costs on the basis of "excess" demand (the difference between the utility's peak and average demands).

19

Moreover, Gary Pearson [sic], Colo-Ute's supervisor of rate and cost analysis, testified that he could not think of "any articles concerning utilization of this type of rate in any other wholesale rate proceeding";

further, to his knowledge, "this rate concept [has never] been used in Colorado before."

20

See also Electricity Consumer's Resource Council v. Federal Energy Regulatory Comm'n, 747 F.2d 1511 (D.C. Cir. 1984). In that case, the court reversed the adoption by the Federal Energy Regulatory Commission (FERC) of a rate-making modification which effectively shifted demand costs to the energy component of the electric rate in question. The court held that the evidence failed to show that the modification would result in a rate which was cost tracking. In the words of that court: "[T]he commission appears to treat the demand charge like modeling clay in order to force the application of marginal cost pricing to the energy component." 747 F.2d at 1515.

Colorado-Ute Electric v. Public Utilities Commission
No. 86SA244

JUSTICE ERICKSON concurring in part and dissenting in part:

I would affirm the decision of the Public Utilities Commission of Colorado (PUC). I agree with the majority that this appeal is not moot and that the PUC had statutory authority to determine sua sponte whether the tariffs filed by Colorado-Ute Electric Association (Colo-Ute) were just and reasonable. I also agree with the majority that substantial evidence supports the PUC's order that Colo-Ute's proposed rate be replaced by a seasonally differentiated demand-energy rate. In my view, however, competent evidence supports the PUC's allocation of $24,084,126, representing part of the fixed capital costs of Colo-Ute's coal-fired plants, to the energy component of the formula used to determine the new rate. Accordingly, I would reverse the trial court and remand with directions to affirm the PUC's order.

I.

The PUC's order is supported by the testimony of Warren L. Wendling (Wendling),[1] a Public Utilities Engineering Analyst employed by the PUC. Generally, utilities employ three types of power plants to meet fluctuating demands for electricity. Coal-fired plants typically operate continuously. They are expensive to construct, but because of the low cost of coal, cheap to operate. The combined generating capacity of plants that a utility operates continuously is called the "base load capacity" of the utility.[2] When the demand for electricity exceeds the base load capacity, the utility typically uses either oil- or gas-fired plants to satisfy the "peaks" in demand.[3] These plants are cheap to build, but because of the high cost

of oil and gas, expensive to operate. Contrary to industry practice, Colo-Ute employs only coal-fired plants to meet all of its commitments to power users.

As an integral part of the PUC's rate determination, Wendling performed a cost-of-service study (study) to compute the utility's "cost of service," the total revenues required to cover the utility's cost of operation plus a fair return on its investment. The "cost of service" is used to set the demand-energy rates for each of Colo-Ute's customers.[4] The study allocates costs to each customer by dividing Colo-Ute's costs into numerous categories. The costs distributed to each category are adjusted to provide Colo-Ute with a reasonable rate of return and then allocated to each customer based in part on the customer's consumption of electricity. Wendling's study was the only cost-of-service study of Colo-Ute presented to the PUC.

In the cost-of-service study, Wendling followed generally accepted cost allocation methods, such as that contained in the NARUC Electric Utility Cost Allocation Manual. Generally accepted allocation methods assume that a utility uses either oil- or gas-powered plants to meet peaks in demand. Accordingly, Wendling concluded that the study results had to be modified to reflect Colo-Ute's investment in coal-powered plants to meet peaks in demand. Colo-Ute's use of coal-fired plants, rather than oil- or gas-powered plants, to meet surges in demand in excess of base load capacity results in lower fuel costs but higher plant construction costs (capital costs). To strictly follow the unmodified study results would defeat the purpose of the study itself; that is, the study's results would not accurately track Colo-Ute's actual cost of service.[5] Without appropriate adjustments, the demand-energy rates would cause non-peak users of electricity to subsidize peak users.

Accordingly, based upon his analysis of Colo-Ute's operations Wendling modified the results of his study by allocating $24,086,126, the plant capital costs required to supply peak demand, from the demand component of the demand-energy rate to the energy component. The modification caused customers to pay more for electricity used to satisfy peak demands than under the unadjusted rates.[6]

Based on the testimony of Wendling, the PUC made the following findings:

> Wendling testified that . . . there should be a recognition of the utilities' [sic] investment in thermal coal-fired generation plants. Investment in such plants minimizes the cost of fuel relative to investment in peaking plants with its attendant low capacity or capital costs and high fuel costs for fuels such as oil or gas.
>
> . . . Substantial portions of [Colo-Ute's coal-fired units] are being used for peaking purposes. In effect, units with high capital costs and low running costs have been substituted for units with low capital costs and high running costs in meeting Colorado Ute's [electrical needs]. Although such capital substitutions may accord with the national energy policy, it nevertheless creates an artificially high demand charge and an artificially low energy charge. Moreover, no recognition is given to the off-peak use of base load capacity.

The PUC examined Wendling's modification of the study results and concluded that the allocation would enable more accurate tracking of Colo-Ute's costs.[7]

II.

Atlantic Richfield Company (ARCO) and Exxon Corporation (Exxon), two customers of Colo-Ute who will pay higher power costs as a result of Wendling's modification, contend that the PUC's decision to modify the study results is not supported by substantial evidence. They argue that the capital costs of the coal-powered plants are "fixed costs" and can only be recovered in the demand variable of the demand-energy rate and that the allocation of $24,084,126 to the energy component of the rate was arbitrary and capricious. Finally, they claim that the PUC's prescribed energy rates are discriminatory in violation of sections 40-3-102 and -106, 17 C.R.S. (1984 & 1987 Supp.).

A.

In reviewing the propriety of the PUC's modification to the demand-energy rate, we must consider two issues: (1) whether the decision to modify the rate formula constituted an abuse of discretion and (2) whether the amount of the modification was supported by the record. Concerning the first issue, the PUC has broad discretion in determining rates, provided the rates are just and reasonable. Colorado Ute Elec. Ass'n, Inc. v. Public Util. Comm'n, 198 Colo. 534, 602 P.2d 861 (1979); Consumers' League v. Colorado & S. Ry., 53 Colo. 54, 125 P. 577 (1912); § 40-3-102. It is the result reached, not the method employed, which determines whether a rate is just and reasonable. City of Montrose v. Public Util. Comm'n, 629 P. 2d 619 (Colo. 1981). Orders of the PUC are presumed to be

just and reasonable. Id. at 623. Rate-making is not an exact science but a legislative function involving many questions of judgment and discretion based upon a myriad of factors including evidentiary facts, calculations, known factors, and adjustments that may affect the relationship between known factors. City of Montrose, 629 P.2d at 623; Colorado Ute Elec. Ass'n, 198 Colo. at 539, 602 P.2d at 864. A reviewing court has neither the expertise nor resources of the PUC and, absent a clear abuse of discretion, should not substitute its judgment for that of the PUC. Atchison, T. & S. F. Ry. v. Public Util. Comm'n, 194 Colo. 263, 572 P. 2d 138 (1977).

In my view, the decision to modify the demand-energy rate formula was not an abuse of discretion. The PUC found, based on competent evidence, that the cost-of-service study did not accurately track Colo-Ute's costs because the study's cost allocations assumed that oil- and gas-powered plants would be used to meet peaks in power demand. The assumption of the study was inappropriate in this case since Colo-Ute employed only coal-fired plants to meet peaks in energy demand. The unmodified rates also failed to realize a policy goal of the PUC. The rates, by not charging increased costs for electricity used to supply peaks in demand, would not encourage Colo-Ute's customers to conserve energy and encourage Colo-Ute to improve its load factor.[8] Although the ability of the PUC to effect social policy through rate-making is limited, Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P.2d 495 (1979), the PUC has a duty to protect the public from unreasonable and unjust rates and to prevent destructive rate-making that could adversely affect the availability of service to the public. Consolidated Freightways Corp. v. Public Util. Comm'n, 158 Colo. 239, 406 P.2d 83 (1965); see Consolidated Gas Supply Corp. v. Federal Power Comm'n, 520 F.2d 1176 (D.C. Cir. 1975) (holding federal

power commission's adoption of new rate formula, shifting a greater proportion of capital costs from the demand component to the commodity component of the rate formula, to be just and reasonable where the modification was supported neither by technical research nor by commission studies); Fuels Research Council, Inc. v. Federal Power Comm'n, 374 F.2d 842 (7th Cir. 1967) (recognizing federal power commission's broad discretion in using rate formulas to achieve policy goals); State Corp. Comm'n v. Federal Power Comm'n, 206 F.2d 690 (8th Cir. 1953) (affirming power commission's adoption of new rate formula that was supported neither by technical literature nor by commission studies or research), cert. denied, 346 U.S. 922 (1954). Considering the innumerable factors that must be identified and quantified to determine rates, scientific precision in rate-making is not always possible and the PUC must be accorded broad discretion in setting rates. Accordingly, since the impact of the modified rate on Colo-Ute and its customers is just and reasonable, the modification of the rate was not an abuse of discretion.

B.

The second issue raised by ARCO and Exxon is whether the amount of the modification, $24,084,126, is supported by the record. Section 40-6-115(3), 17 C.R.S. (1984), limits the scope of judicial review to determinations whether a PUC decision is unconstitutional, "whether the decision . . . is just and reasonable," and "whether its conclusions are in accordance with the evidence." It is well established that the findings and conclusions of the PUC on disputed questions of fact, when based on competent evidence, are final and must be upheld on judicial review.[9] See, e.g., Mellow Yellow Taxi Co. v. Public Util. Comm'n, 644 P.2d 18 (Colo. 1982); Contact-Colorado Springs, Inc. v. Mobile Radio Tel. Serv., Inc., 191 Colo. 180,

551 P.2d 203 (1976). While the factual findings of the PUC need not be presented in any particular form and may even be implied, the findings must be discernible to the reviewing court. Caldwell v. Public Util. Comm'n, 200 Colo. 134, 613 P.2d 328 (1980).

In my view, the amount of the modification is supported by competent evidence and must be upheld on review. Based upon his analysis of Colo-Ute's operation and his calculations, Wendling stated that a modification of the rate formula in the amount of $24,084,126 was necessary to permit accurate tracking of Colo-Ute's costs.[10] Although a time-of-day rate would also have enabled accurate tracking of Colo-Ute's costs, Wendling testified that that rate would be much more difficult to implement and would provide less accurate results. Accordingly, the modification of the demand-energy rate must be upheld on review.

III.

Finally, ARCO and Exxon contend that the PUC's prescribed energy rates are discriminatory in violation of sections 40-3-102 and -106, 17 C.R.S. (1984 & 1987 Supp.). They claim that the PUC's modifications to the demand-energy rate do not accurately track actual costs and are discriminatory because they cause some users to subsidize rates of other users. They argue that the modified rates (1) favor winter users and discriminate against summer users and (2) favor customers with fluctuating demand for electricity during the year and discriminate against those customers with relatively constant demand each year.

Section 40-3-102 provides that the PUC has authority "to prevent unjust discriminations" in rates, charges, and tariffs.

(Emphasis added.) Section 40-3-106(1) states that "no public utility shall . . . make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage" and that no utility "shall establish or maintain any unreasonable difference . . . in any respect, either between localities or as between any class of service." (Emphasis added.) In Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P.2d 495 (1979), we found a violation of section 40-3-106(1) when the PUC ordered utility companies to provide a lower rate to low-income elderly and low-income disabled persons that was "unrelated to the cost or type of service provided." Id. at 59, 590 P.2d at 498 (emphasis added).

In this case, the modification of the demand-energy formula is related to the actual costs of Colo-Ute to supply users and violates neither section 40-3-102 nor -106. On the contrary, the modification prevents non-peak users from subsidizing peak users and avoids the type of unjust discrimination raised by ARCO and Exxon. The unadjusted demand-energy rates endorsed by ARCO and Exxon discriminate against certain users since the rates do not accurately reflect Colo-Ute's costs. Competent evidence in the record supports the PUC's conclusion that the modified rates accurately reflect Colo-Ute's costs and therefore charge Colo-Ute's customers fairly.

Accordingly, I would reverse the district court and remand with directions to affirm the PUC.

I am authorized to say that JUSTICE LOHR and JUSTICE VOLLACK join in this dissent.

1

The qualifications and experience of Wendling was admitted as evidence. Wendling has a bachelors degree in electrical engineering, a masters degree in science, and a masters degree in business administration. He is a registered professional engineer in Colorado with over eight years' experience in electrical engineering. He has previously testified as an expert witness before the PUC in other cases involving rate determinations.

2

"Base load" units are those units that are in continuous operation and "base load capacity" is the generating capacity of those units. Mississippi Indus. v. Federal Regulatory Comm'n, 808 F.2d 1525 (D.C. Cir.), vacated in part, 814 F.2d 773 (D.C. Cir.), opinion reinstated, 822 F.2d 1103 (D.C. Cir.), cert. denied, 108 S. Ct. 500 (1987). The "generating capacity" of a power plant refers to the maximum amount of electricity that it can generate.

3

Peak demand refers to demand in excess of base load capacity. The plants used to meet peaks in demand are called "peaking plants." The typical period of peak demand for utilities is during the winter, when energy demand far exceeds demand during other times of the year. During non-peak periods, demand is typically met by the base units, which are generally coal powered plants. When the demand of cooperative members is less than base load capacity, Colo-Ute sells the unused capacity to non-members.

4

The demand variable is a component used to determine the demand-energy rate and is the sum of several components, including a generation component. The generation component is based on total average and excess demand (also called "Average and Excess Demand"), which is the sum of the average demand and excess demand figures. Demand-related costs are

allocated by the generation component based on "average demand" (annual kilowatt hour usage) and "excess demand" (difference between the utility's peak and average demands).

5

Wendling testified:

> The energy charge was computed [after the demand charge]. Here Staff is proposing only for generation costs to recognize the increase[d] investment in demand related dollars made by Colorado-Ute in its generating plant so that they can burn coal. A utility can minimize its investment in generation plant by constructing oil or gas fired generators. However, a fuel cost penalty is [incurred]. On the other hand a utility may expend more capital and build a coal fired unit and burn a lower priced fuel. Therefore, this additional investment should be recovered in the energy charge. To accomplish this consistent with the cost of service methodology the average portion of the average and excess demand allocation factor was split. . . .

6

Wendling testified that another way to accurately track Colo-Ute's costs is through a time-of-day rate. He stated that a portion of the average demand component of the average and excess demand allocation for Colo-Ute should be recovered in the energy charge since that component is analogous to the base load portion of generating capacity. In time-of-day rates, the costs of base load generating capacity are recovered through the rate's energy component. He stated that a similar formula was used in two prior PUC rate determinations. According to Wendling, his rate design tracked costs better than time-of-day rates and was much easier to

implement. The PUC and Wendling use the terms "time-of-day rate" and "time-of-use" rate interchangeably.

7

Other pertinent parts of the PUC order stated:

> One way to address [Colo-Ute's investment in coal fired plants to meet peaks in demand] is by the use of a time-of-use rate which would recognize the use of capacity at the time it occurs.
>
> The disadvantages of a time-of-use rate, of course, is the increased complexity of metering and billing and the need to perform cost allocation studies for the distribution cooperatives. As a surrogate for such a rate, Mr. Wendling proposed a modification of the demand-energy rate. In this modified rate, the dollars of generation costs associated with the average portion of the [average and excess demand] allocation were spread into the energy charge. Mr. Wendling testified that for the Colorado-Ute system, the amount so calculated approximated very closely the dollars of base load generation that would have been spread to all hours by a time-of-use rate.

8

A customer's annual "load factor" is the percentage relationship of its average daily demand (annual use/365) to its maximum daily demand. Northern Ind. Pub. Serv. Co. v. Federal Energy Regulatory Comm'n, 782 F.2d 730 (1986). Concerning the modification of the demand-energy rate, the PUC order stated:

> . . . For Colorado-Ute's particular load shape and seasonality, the excess portion of the AED [average and excess demand] is a proxy for the peaking portion of the generating facilities. This peaking capacity was allocated on the basis of coincident peak demand recognizing that the members exhibit a high coincidence with the Colorado-Ute system peak. Placing only the excess portion of the AED allocation in the demand charge provides an automatic incentive to Colorado-Ute to improve its system load factor since the higher the load factor becomes, the higher is the proportion of generation costs collected in the energy charge and the lower is the demand charge. This provides the incentive to maintain and improve the system load factor that was absent in the flat energy rate. . . . This should, if applied in conjunction with an effective resource management plan, produce essentially a flat rate, the very rate Colorado Ute seeks to employ. This rate form has the additional advantage that, in the present application, it comports with the regulatory objective of rate stability.

9

We have also held that the PUC's findings and conclusions may be set aside or modified if not supported by substantial evidence. See, e.g., City of Montrose, 629 P.2d at 622; Public Util. Comm'n v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930). The substantial evidence standard requires a party challenging the findings and conclusions of the PUC to carry a heavy burden.

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a

> conclusion," . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

National Labor Relations Bd. v. Columbian E. & S. Co., Inc., 306 U.S. 292, 300 (1939) (quoting Consolidated Edison Co. v. National Labor Relations Bd., 305 U.S. 197, 229 (1938)). See generally 5 K. Davis, Administrative Law Treatise § 29:5 (2d ed. 1984)(discussing substantial evidence standard). In my view, the PUC's findings and conclusions in this case are supported by substantial evidence.

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Wendling's opinion that a modification in the amount of $24,084,126 was necessary was based on the staff's separation of demand functionalized costs and revenues. See supra note 5. The $24,084,126 is the sum of the total of the average demand portion as set forth in Exhibit 60 in the PUC hearing.

DISTRICT COURT, MONTROSE COUNTY, COLORADO

Civil Action No. 83 CV 218

ORDER

COLORADO-UTE ELECTRIC ASSOCIATION, INC.;
DELTA-MONTROSE ELECTRIC ASSOCIATION;
EMPIRE ELECTRIC ASSOCIATION, INC.;
GRAND VALLEY RURAL POWER LINES, INC.;
GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.;
HOLY CROSS ELECTRIC ASSOCIATION, INC.;
INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION;
LA PLATA ELECTRIC ASSOCIATION, INC.;
SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.;
SAN ISABEL ELECTRIC ASSOCIATION, INC.;
SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.;
SAN MIGUEL POWER ASSOCIATION, INC.;
SOUTHEAST COLORADO POWER ASSOCIATION;
WHITE RIVER ELECTRIC ASSOCIATION, INC.; and
YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; CHERYL MUHOVICH; UNION CARBIDE CORPORATION; SHELL OIL COMPANY; EXXON

COMPANY, U.S.A.; ATLANTIC RICHFIELD COMPANY; and CITY OF DELTA, COLORADO,

Respondents.

AND

DISTRICT COURT, MONTROSE COUNTY, COLORADO

Civil Action No. 84 CV 07

ORDER

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners.

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE, ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III and COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondents,

and

SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; CHERYL MUHOVICH; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; CITY OF DELTA, COLORADO; UNION CARBIDE CORPORATION; WESTERN SLOPE ENERGY RESEARCH CENTER; WESTERN COLORADO CONGRESS; SHELL OIL COMPANY; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; and SOUTHWEST [sic] COLORADO POWER ASSOCIATION,

Intervenors.

This matter coming on for hearing this 12th day of March, 1985, and the Court receiving argument of counsel, being advised in the parties' briefs, reviewing the record, and being otherwise advised in the premises, hereby enters the following order:

83 CV 218

I. HISTORY

Colorado-Ute Electric Association, Inc. (hereinafter referred to as Colorado-Ute) generates and transmits electrical power on a wholesale basis to fourteen member electrical cooperatives

(hereinafter referred to as Co-ops), which in turn, sell the electrical power on a retail basis to electrical consumers. The Co-ops are consumer-owned and also have representatives on the Board of Directors of Colorado-Ute, which is a non-profit corporation.

Colorado-Ute filed Advice Letter Number 45 with the Public Utilities Commission (hereinafter referred to as the Commission or PUC) on December 15, 1981, to increase its revenue by approximately 12.157%. At this time, Colorado-Ute's pricing rate to its fourteen member Co-ops was on a flat rate, that is, a flat rate per kilo-watt [sic] hours used. This method of charging had previously been approved by the PUC on February 24, 1981, in Decision No. C81-373. No member co-op is charged under a demand-energy rate. As a result of Advice Letter Number 45, the PUC instituted Case No. 6076 and set the matter for hearing.

The hearing was held over several days in October and November of 1982, and none of Colorado-Ute's member Co-ops complained to the PUC about the rate increase or the pricing rate. As a result of the hearing, the PUC granted the request for the increase in revenue but required Colorado-Ute to change from charging its member Co-ops on a flat rate to requiring Colorado-Ute to institute what was called a seasonably-differentiated demand-energy rate. As a result of the hearings in Case No. 6076, the PUC issued Decision No. C83-1176, dated July 26, 1983. A re-hearing was held and the PUC issued Decision No. C83-1392 on September 7, 1983, which denied the application for re-hearing by Colorado-Ute and granted, in part, some of the requests filed by Exxon and Arco. Applications for re-hearing were again filed, and by Decision No. C83-1561, the Commission denied those applications.

On October 21, 1983, Colorado-Ute and the twelve member Co-ops filed a petition for writ of certiorari in the Montrose District Court and also filed a motion for stay or suspension of the PUC's decisions. The motion for stay or suspension of the Commission decisions was granted on January 16, 1984, and a briefing schedule was then set forth for the parties.

II. GROUNDS FOR REVIEW

Colorado-Ute alleges that the Commission decisions outlined above are unlawful, arbitrary, capricious, unjust, unreasonable and abuse of discretion and violate their rights under the Constitutions of the United States and the State of Colorado and that the PUC has not regularly pursued its authority and has rendered decisions upon findings and conclusions not in accordance with the law and the evidence of record. Colorado-Ute and the member Co-ops make the following assertions:

1. The Commission does not have jurisdiction to investigate the filing of a tariff or schedule under C.R.S. 1973, 40-6-111(4) by a cooperative electric association where no member or consumer of such cooperative or affected public utility has filed a complaint, as required by Section 40-6-111(4), which provides in part:

> "Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of Section 40-3-106(1) or Section 40-3-111. Upon complaint filed by any member or customer of a cooperative electric

> association or by any affected public utility, the Commission shall determine whether the rate, charge, rule or regulation in question is contrary to this section, Section 40-3-106(1), or Section 40-3-111."

C.R.S. 1973, 40-3-106 prohibits a public utility from making any preferential or advantage or subjecting any corporation or person to any prejudice or disadvantage. C.R.S. 1973, 40-3-111 provides that whenever the PUC, after hearing, finds that rates, charges, classifications, regulations or practices, etcetera, are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law or that they are insufficient, the Commission shall determine the just, reasonable or sufficient rates, rules, regulations, etcetera, and may consider any factors which influence an adequate supply of energy and any factors which encourage energy conservation. This particular statute also allows the PUC, upon its own motion or upon complaint, to investigate the matter and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, or schedules, in lieu of the previous existing matters.

Several statutes contained within the public utilities law grant the PUC the authority and the power to conduct hearings and investigations as to the propriety of rates, charges, classifications, etcetera, upon the filing of a complaint or on its own motion. In contrast, this statute, 40-6-111(4)(a), permits that authority only upon the filing of a complaint by any member or customer of a cooperative electric association or by any affected public utility. Subparagraph (4)(a) removes the power of the PUC to suspend rates, fares, tolls, rentals, charges, classifications, practices, rules or regulations pending a hearing, and does not provide that the PUC, of its own motion, may

hold such hearings. Even upon complaint, Subparagraph (4)(a) limits the Commission's determination to whether or not the rate, charge, rule or regulation in question is contrary to 40-6-111, 40-3-106(1) or 40-3-111. Here we have a specific statutory scheme set out by the legislature and the general rule is set forth in State v. Dayhoff, et al., 609 P.2d 119 (Colo. 1980), in which the court stated:

> "Finally, we adhere to the well-established rule that where specific and general statutes conflict, the provisions of the specific statute prevail [citations omitted]."

While the legislature has enacted numerous general and specific statutory provisions relating to public utilities in general, 40-6-111(4)(a) is a specific statutory provision relating to cooperative electric associations, and must be followed. To hold otherwise would be to create nonsense out of what appears to the Court to be a very clear and unambiguous statute and to defeat the obvious legislative intent of the Legislature. People v. Meyers, 182 Colo. 21, 510 P.2d 430 (1973). The Court therefore finds that the PUC does not have the authority pursuant to C.R.S. 1973, 40-6-111 (4), without complaint as provided by statute, to change the rate design of an elective [sic] cooperative such as Colorado-Ute.

2. Colorado-Ute argues that the PUC may not reject a tariff by a cooperative electric association and direct the cooperative to file a new tariff or schedule without finding that the original tariff or schedule was unjust, unreasonable, discriminatory, preferential or otherwise in violation of the law, and without further finding that the new tariff or schedule ordered by the Commission is just, reasonable, non-discriminatory, non-preferential, or not unlawful.

This particular point was addressed in Decision No. C83-1392 at Page 3. This was the re-hearing order in Case No. 6076 which essentially denied the petitioner's application for re-hearing and affirmed its previous order in Case No. 6076, that is, its Decision No. C83-1176. At Page 3 of that Decision, the PUC rejected Colorado-Ute's argument that the PUC was required to find that Colorado-Ute's rate schedules were unjust and unreasonable and that the rates ordered by the PUC were just and reasonable, relying on the case of Aspen Airways, Inc. v. Public Utilities Commission, 169 Colo. 56, 453 P.2d 789 (1969) holding that the findings of the Commission need not take any particular form and that certain findings of the Commission may be implied. The Commission thereupon made the following finding:

> ". . . since, in Colorado-Ute's view, the record does not contain any competent evidence that a unit pricing rate, which charges everyone the same cents per kilo-watt [sic] hour, is unjust, unreasonable, discriminatory, preferential, or in violation of the law, we shall nonetheless explicitly state that Colorado-Ute's rate structure is in fact unjust, unreasonable, discriminatory, and preferential, and that its unit pricing rate is not cost tracking for the reasons set forth in Decision No. C83-1176. By the same token, we explicitly find the rate schedule proposed by the staff of the Commission, as a result of its cost-of-service study, being a demand-energy rate with seasonally differentiated demand charges for summer and winter and an annualized energy charge on a uniform kwh basis, is more nearly cost tracking than that proposed by

> Colorado-Ute, and accordingly, the staff rate is, in fact, just and reasonable and should be adopted."

The whole tenor of Decision No. C83-1176 as it relates to rate design is one of personal preference on the part of the Commission as opposed to specific findings of fact which would support a new rate design. The essence of the PUC findings is that the seasonally differentiated demand-energy rate, based on the PUC staff's cost-of-service study, is more cost tracking, provides an accurate price signal, and will encourage a more effective resource management plan. The apparent basis for requiring the implementation of a demand-energy rate is found at Page 16 of Decision No. C83-1176 wherein the Commission found that the Colorado-Ute members exhibit a high coincidence of demand with the Colorado-Ute system peak and therefore demand-energy rates are appropriate for Colorado-Ute. The Commission found that because the total cost per unit of output varies monthly, that this condition resulted in an uneconomic under-utilization of capacity.

In coming to this conclusion, the Commission ignored the evidence presented by Colorado-Ute and the member Co-ops that a combination of a flat energy rate charge and proper resource management will have the same effect. The Commission did not accept the notion that the overall economic conditions, such as the recession and surplus energy in the region has made Colorado-Ute less able to sell energy to non-members so as to more effectively use its plants, however, the Commission stated that these factors were imponderable at best. However, this ignores C.R.S. 1973, 40-3-111(1) which provides in part:

> ". . . any may consider any factors which influence an adequate supply of energy and any factors which encourage energy conservation."

Strangely, the Commission, at Page 22 of its Decision in C83-1176 found that the use of the demand-energy rate, if applied in conjunction with an effective resource management plan, would produce essentially a flat rate, the very rate Colorado-Ute seeks to employ. The Commission further stated that this rate form would have the additional advantage of rate stability which is a regulatory objective.

There does not appear to be any evidence to support that conclusion, and on the contrary, it is difficult to conceive a more stable rate than the flat energy rate currently used by Colorado-Ute. Since the result of the proposed energy-demand rate sought to be instituted by the Commission, in conjunction with an effective resource management plan, is essentially a flat rate, it is extremely difficult to see why the flat energy rate currently employed by Colorado-Ute, in conjunction with an effective resource management plan, needs to be changed. Based upon the Commission's findings contained in Decision No. C83-1176, it is clear that the Commission has simply preferred its own rate design over that employed by Colorado-Ute, and as such, should be set aside. The Colorado Supreme Court in Public Utilities Commission v. Colorado Motorway, Inc., 165 Colo. 1, 437 P.2d 44 (1968) stated that:

> "There is no question, as an abstract proposition of law, that the Commission has broad constitutional and statutory authority. However, the breadth of that authority is to be tested by the statutes themselves and not by the unbridled whim of the Commission. The Commission is

> a creature of statute. Both the power and the scope of its authority and its procedures are necessarily controlled by the act upon which it relies."

C.R.S. 1973, 40-6-111(4), specifically provides:

> "The Commission shall determine whether the rate, charge, rule, or regulation in question is contrary to this section, Section 40-4-106(1) or Section 40-3-111."

The Commission has made no such findings in any of its decisions regarding Case No. 6076, and a review of the record indicates that no such findings can reasonably be made. The bootstrap attempt to do so in Decision No. C83-1392 makes no additional findings than those contained in the original Decision No. C83-1176. Nothing in the record supports the boldfaced conclusions stated by the Commission on Page 3 in Decision No. C83-1392 that the flat energy rate currently charged by Colorado-Ute is discriminatory, preferential, creates an advantage, or otherwise violates 40-3-106(1) or 40-3-111. Further, it appears that the requirement by the Commission that Colorado-Ute implement a new rate design was of its own motion, based on staff recommendations without the filing of a complaint by any member or customer of a cooperative electric association or by any affected public utility. The Court does agree with the Commission that Colorado-Ute can hardly claim surprise after going through several days of hearing [sic] when it appears from the record that the question of rate design was the primary concern, however, that does not alter the statutory requirement that a complaint must be filed. Therefore, the Court finds that the Commission improperly considered the rate design which was not requested by Advice Letter No. 45.

Findings 1 and 5 on Page 22 of Decision C83-1176 are the closest thing to findings which would support the Commission's decision pursuant to 40-3-106(1), being that Colorado-Ute's costs are not uniform at all levels of output, and that the demand-energy rate more directly tracks cost than a flat rate. However, there is no finding that this is an unreasonable difference as to rates or charges between localities or class of service. As outlined earlier, based on the Commission's own findings, either rate design coupled with an effective resource management plan will produce essentially the same result. The record does not support the contention that any such findings pursuant to 40-3-106, 40-3-111 or 40-6-111 can be made, and the Commission made no such findings.

The Court does agree with the Commission in Decision No. C83-1392 that certain findings of the Commission may be implied, and the fact that the Commission did not specifically determine that the demand-energy rate ordered by the Commission was just, reasonable or sufficient is of no particular consequence. The whole tenor of Decision No. C83-1176, is that the Commission felt that its proposed rate design was just, reasonable and sufficient, however, these findings, both implied and stated, are conclusive in nature and are not supported by any factual findings based on the record.

Colorado-Ute argues that, while the Commission found that the revenue increase sought by Colorado-Ute was reasonable and should be granted, that the new rate design did not take into consideration whether or not they would be sufficient pursuant to 40-3-111. The rate design and rate proposed by the Commission failed to take into account the uncontroverted testimony that the proposed rate would raise revenue when Colorado-Ute's monthly costs are at its lowest point and lower the rates when its monthly costs are highest. The Commission

found that the TIER of 1.31 would be reasonable and that the proposed rate design and rate would provide Colorado-Ute with a margin of safety in meeting its indenture requirements, however, there is nothing in the record to indicate how this would be done. The expectation, of course, is that this would average out over a calendar year, but does not take into account the financial difficulties which apparently would be encountered by Colorado-Ute in the summertime, resulting in increased short-term borrowing by Colorado-Ute. This also did not take into account the increased costs associated with a changed billing procedure and acquisition of equipment and meters necessary to implement the changeover. There is no indication, except conjecture, that such rates would be sufficient and would allow Colorado-Ute to achieve the TIER level.

3. Colorado-Ute next argues that the Commission may not disregard the convenience and preference of Colorado-Ute and its member Co-ops in designing rates for electrical service by substituting the Commission's own rate design.

In this case, Colorado-Ute by its Advice Letter No. 45 was not seeking to change its existing rate design, but merely seeking an increase in that rate. The record is clear that Colorado-Ute and all member co-ops which provided testimony before the Commission supported a unit pricing rate, that is, the flat energy rate. People's National Gas Division v. Public Utilities Commission, 193 Colo. 421, 567 P.2d 377 (1977) notes that unless there is a substantial showing that rate payers are prejudiced materially by the managerial options in the area of capital financing, such matters are within the realm of sound management discretion of the public utility. That case dealt with capital financing as opposed to rate design, however, the principle remains the same. Although an old case, this principle was also followed in Refining Co. v Public Utilities Commis-

sion, 68 Colo. 137 (1920), determined that the cancelling of an existing rate in a contract could only be done if the Commission determined that the contract rate was detrimental and injuriously affected the public welfare. That case requires the Commission to determine that the rate is so unreasonable as to be detrimental to the public interests before the Commission may establish the new rate. Even in this case, the court was talking about the rate as opposed to a new rate design. Also see 73B C.J.S., Public Utilities, § 19. There is no evidence of a substantial showing that the rate payers are being materially prejudiced by the unit pricing rate and apart from the staff, as outlined earlier, only the intervenors such as Union Carbide and Exxon, which would benefit from the new rate design, opposed the unit pricing rate.

The Commission ignored substantial testimony in the record by the member Co-ops in which they testified that if Colorado-Ute were forced to charge them on an energy-demand rate, they in turn would have to charge their consumers on the same basis. Not only would this necessitate a change in billing and metering by Colorado-Ute, and therefore increase the cost, but the same effect would apply to the member Co-ops and the end use consumer. This, contrasted against the questionable benefits of going to an energy-demand rate does not support the Commission's findings.

The Court finds that the Commission's action in changing Colorado-Ute's rate design from a flat energy rate to a seasonally adjusted demand-energy rate is an unwarranted intrusion into the management prerogatives and discretion of Colorado-Ute. The Commission itself in Decision No. C81-373, February 24, 1981, approved a flat energy rate for Colorado-Ute. Page 4 of that Decision recites several findings made by the Commission in this regard and the Commission in that Deci-

sion notes that the costs to Colorado-Ute to generate power are basically constant and uniform, and that a flat energy rate would recover both the demand cost and the energy cost on the basis of usage. The Court can find no findings in Decision No. C83-1176 which vitiates these findings previously made by the Commission, and although the Commission has general authority to correct managerial abuses of discretion which adversely or injuriously affect the public interest, no such findings have been made. As stated in Public Service Co. v. Public Utilities Commission, 653 P.2d 1117 (Colo. 1982), the management of the public utility belongs to the company. And where, as here, there is no evidence or findings of abuse, the Court can only conclude that the Commission is substituting its own personal preference in managerial matters and has exceeded its statutory authority.

Based upon the record, it is clear that the Commission totally ignored the evidence and the testimony presented by Colorado-Ute and the member Co-ops concerning the flat energy rate. The Court concurs with Mr. James at Page 13 of his brief wherein it is noted that Colorado-Ute and the member Co-ops have had an experience factor with both a flat energy rate structure and a demand-energy rate structure and all, without exception, from a managerial point of view, favor the flat energy rate. This is particularly highlighted by the fact that, while Colorado-Ute only wholesales power to the fourteen member Co-ops, the member Co-ops retail this electrical power to the use of the consumer. Their testimony, particularly as it relates to an understandable pricing signal and general wants of the public, cannot be minimized. This is particularly true since Colorado-Ute and the fourteen member Co-ops are all non-profit, consumer-owned, cooperatives. It is extremely difficult to ascertain any improper motivation on the part of their collective managements which would cause them to prefer a flat

energy rate. Certainly the profit motive does not exist, and it is difficult to see any irresponsibility in their wanting to keep the flat energy rate.

4. Colorado-Ute next argues that its right to due process under the Fourteenth Amendment to the United States Constitution and under Article II, § 25 of the Colorado Constitution, was violated by admitting testimony based on the WASP-82 computer analysis, and that the Commission violated C.R.S. 1973, 24-72-304 (The Colorado Open Records Act), in refusing to provide Colorado-Ute with a copy of the WASP-82 computer program.

The Court rejects this argument advanced by Colorado-Ute. Hearings in this case were held before the Commission on seven separate days between October 6, 1982, and ending November 16, 1982. While Colorado-Ute is entitled to due process as set forth in Mountain States T. and T. Co. v. Department of Labor, 184 Colo. 334, 520 P.2d 586 (1974), a review of the record discloses that Colorado-Ute did not receive information on the WASP-82 analysis and did sponsor testimony as a result thereof. This matter was discussed at length at the hearing date on October 26, 1982, and again on November 15, 1982. Colorado-Ute erroneously stood on their objection and did not cross-examine staff witness Mr. Wendling, and did so at their own peril. Based upon the application for re-hearing, the Commission in its Decision No. 1392 addressed this issue on Pages 3 and 4 of that Decision, and a review of the record in that regard clearly substantiates the Commission in that regard. The Court therefore finds that the Commission neither violated the Colorado Open Records Act nor Colorado-Ute's right to due process under the Fourteenth Amendment to the U.S. Constitution or Article II, § 25 of the Colorado Constitution.

5. The record does not support the conclusions reached by the PUC as to the applicability of the demand-energy rate to the Colorado-Ute system.

The Commission relied heavily upon Exhibit 94 in an attempt to show a high coincidence between the system's peaks and the members' peaks, however, that Exhibit does not appear to accurately track all of the data available to determine coincidence of peaks. Page 1 of that Exhibit, listing the date and time of occurrence of member system peaks, together with the Colorado-Ute system peak "date hour", shows that the peaks are not nearly as coincident as believed by the Commission. It appears from the testimony in the record that the applicability of the demand-energy rate to the Colorado-Ute system is only appropriate if the peak demands are highly coincident. Further, the testimony indicated that the demand energy rate acts as a functional surrogate for time-of-day rates, and that time-of-day rates are not relevant at this point in time for the Colorado-Ute electric system. In short, there does not appear to be sufficient competent evidence for the Commission to conclude that either the demand-energy rate is most appropriate for Colorado-Ute because of the high degree of coincidence of peaks, nor that the demand energy rate is the most cost tracking rate available for Colorado-Ute.

III. CONCLUSION

WHEREFORE, based upon the foregoing, the Court hereby directs that the order of the Commission in Decision No. C83-1176 requiring Colorado-Ute Electric Association, Inc. to file rates and tariffs reflecting the rates set forth in Appendix B of said order is hereby set aside and is of no force and effect. Paragraph 3 of said order is hereby affirmed, and Colorado-Ute Electric Association shall submit to the Commission a feasibility study of a load research program as contained in the

Commission's order. Further, the suspending bond filed by Colorado-Ute in the amount of $500,000.00 is hereby discharged and released.

84 CV 7

I. HISTORY

This case, 84 CV 7, was consolidated with Case No. 83 CV 218, and was docketed in the Montrose District Court on January 12, 1984. Atlantic Richfield Co. (hereinafter referred to as ARCO), and Exxon Corporation (hereinafter referred to as Exxon) had filed a complaint seeking judicial review of the Commission's decision in Case No. 6076. A motion to dismiss the petitioners' complaint was filed by several of the intervenors and by Colorado-Ute, which motions were denied on January 4, 1984. Because of the similarity of parties, and because both of these cases revolved around Case No. 6076 before the Commission, venue in Case No. 84 CV 7 was transferred to the Montrose District Court and then consolidated with 83 CV 218. The history of 83 CV 218 and 84 CV 7 are therefore identical, and the only issue in 84 CV 7 relates to ARCO's and Exxon's disagreement with the Commission's decision to shift substantial demand costs into the energy portion of the demand-energy rate required by the Commission and that such shift was contrary to the staff's cost-of-service study, which is Exhibit 84 of the record.

II. GROUNDS FOR REVIEW

1. ARCO and Exxon argue that the Commission's decision to classify certain demand costs as energy costs is not supported by substantial evidence in the record.

In particular, the petitioners argue that the Commission's shift of certain demand related costs to the energy component of the seasonably adjusted energy-demand rate proposed by the staff and required by the Commission to be implemented as set forth in Appendix B of Decision No. C83-1176 is not supported by the evidence and the Commission's findings. According to the staff's cost-of-service study, approximately 56% of Colorado-Ute's costs are fixed capital costs, that is, expenses associated with the generation and transmission of electric power, and 44% of the costs are operational and maintenance expenses, primarily fuel costs. Assuming that the demand-energy rate proposed by the staff and adopted by the Commission is implemented, then that rate includes a demand charge to recover fixed capital costs and an energy charge to recover operational and maintenance expenses, the idea being that a separate energy charge and a separate demand charge most accurately tracks the actual cost of electrical service for any particular user.

In its decision, the Commission allocated $24,084,126.00 of the average demand revenue to the annualized energy charge, which, to a high energy user such as the petitioners, results in increased electrical costs.

Based upon the testimony and recommendations of Mr. Wendling, a staff witness, the Commission shifted part of Colorado-Ute's demand related costs to the energy component of their rate thereby assigning 32% of the cost to the demand charge and 68% to the energy charge, in contrast to the cost of service study which had determined that 56% of the costs were demand related and 44% energy related. The record is not clear on what basis this shift was made, and appears to be an attempt to devise a kind of "time-of-day" rate. The witness

acknowledged that such a rate could not properly be calculated without further data.

While exactitude and unerroring precision is not required, guesswork and personal preference is not allowed. The record is clear that there was no technical literature to support this classification and that the witness had conducted no research or studies which would support this misclassification. This is particularly true when one notes that such misclassification is contrary to the cost-of-service study resulting in a reduction of the demand related costs from 56% to 32% and an increase of the energy related costs from 44% to 68%. As noted on Page 14 of petitioners' brief, the existence of "some evidence and some particulars" is insufficient if the evidence as a whole does not support the Commission's decision. Lassner v. Civil Service Commission, 177 Colo. 257, 259, 493 P.2d 1087, 1089 (1972) (emphasis in original). This is particularly true since the only evidence apart from the conjecture and personal preference of Mr. Wendling is as it relates to the allocation of costs to the demand in energy components of the demand-energy rate, consists of the staff's cost-of-service study. Therefore, the Court finds that the Commission's decision in this regard should be set aside and the Commission be directed to adopt the cost-of-service study rates set forth in Exhibit 84.

2. The petitioners argue that the Commission's misclassification of demand costs as energy costs is arbitrary and capricious.

Any part of the Commission's order which appears to be a matter of personal preference or administrative convenience, and without the necessary investigation and research data, may be considered arbitrary and capricious and therefore invalid. City of Montrose v. Public Utilities Commission, 197 Colo.

119, 590 P.2d 502 (1979). The Court in that case held that there was no study done which would support the order of the Commission, however, in this case, there was a study done, the staff's cost-of-service study, however the basis for the misclassification, contrary to the study, was not founded upon any administrative or technical literature nor upon any research or studies to support the shift. As such, the Court must conclude that the decision of the Commission to reclassify the $24,084.126.00 [sic] of the demand costs to the energy costs was arbitrary and capricious and without sufficient study and foundation. Further, as noted on Page 22 of the petitioners' brief, the evidence indicates that such a study as proposed by Mr. Wendling was feasible, but like the City of Montrose case, supra. was not done.

3. The petitioners argue that the Commission failed to make adequate findings of fact to support its misclassification and shift of certain demand costs as energy costs.

The petitioners contend that the findings of the Commission must be sufficiently clear as to enable the reviewing court to engage in a meaningful review of the Commission's decision. A review of the record shows that the primary basis for this shift of demand costs inconsistent with the cost-of-service study was that Colorado-Ute utilized coal-fired power plants and therefore required a greater investment of capital than that generally needed for oil or gas plants, however, there was no finding nor evidence which suggested how the shift of the $24,084,126.00 corresponded to that premise.

Since one of the primary purposes of the public utilities law is to insure that the rates do not establish an unreasonable difference between classes of customers and that the rate payers be accorded equal treatment, it is clear that this shift of

demand costs to energy costs, contrary of the cost-of-service study, results in an unjust and discriminatory rate as it relates to the petitioners. The practical and end result of this shift, of course, is that the petitioners, and users like them, will pay considerably more for their electrical power and is therefore a preferential rate forbidden by law as set forth in C.R.S. 1973, 40-3-102 and 40-3-106. As pointed out on Pages 30 through 33 of the petitioners' brief, the Commission's proposed rate established a preference in that the winter customers pay rates below the actual cost of service to them (the record shows that Colorado-Ute is a winter peaking system) and that summer users pay higher rates than the actual cost-of-service and therefore in effect subsidizes the preferential rate for winter users. This preference is eliminated by requiring the Commission to adopt the rates based upon the staff's cost-of-service study.

Electric customers such as the petitioners, are constant and consistent users of electrical power, and are high-load consumers. That is, their use of electrical energy is fairly constant and is not significantly increased or decreased by summer or winter conditions. This means that the higher the load the lower the unit cost of electrical energy. Therefore, the misclassification of demand costs as energy costs significantly increase the costs of electrical power to such consumers. Since the rates should approximate the actual cost of service, the PUC rate is discriminatory in nature and in effect requires a high load consumer to subsidize a low load consumer. Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P.2d 495 (1979). While exact precision is not required as noted earlier, the enormity of this shift cannot be justified.

III. CONCLUSION

WHEREFORE, based upon the foregoing, the Court hereby sets aside that portion of the Commission's order in Decision No. C83-1176, Case No. 6076, which allocates $24,084,126.00 of the demand costs to the energy costs, and, if the Court's order in 83 CV 218 is set, hereby directs the Commission to adopt rates based upon the staff's cost-of-service study set forth in Exhibit 84 of the record. For the record and for clarification, 11 of the intervenors had filed a motion to dismiss in the Denver District Court in 84 CV 7, and the Court has not yet formerly [sic] denied Colorado Ute's [sic] motion to dismiss in that case. By this order, the Court hereby denies Colorado-Ute's motion to dismiss.

DONE IN OPEN COURT this 7th day of May, 1986.

/s/ Richard J. Brown
J U D G E

xc: All interested parties

Supreme Court, U.S.
FILED
DEC 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-977

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

APPENDIX TO JURISDICTIONAL STATEMENT
(Volume 2 of 2)

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December 14, 1988

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(Decision No. C83-1176)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE	)	CASE NO. 6076
INVESTIGATION OF THE	)	
SCHEDULES ACCOMPANYING	)	ORDER OF THE
ADVICE LETTER NO. 45,	)	COMMISSION
FILED BY COLORADO-UTE	)	ESTABLISHING
ELECTRIC ASSOCIATION, INC.	)	RATE STRUCTURE

- - - - - - - - - - -

July 26, 1983

- - - - - - - - - - -

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the Commission.

STATEMENT

BY THE COMMISSION:

I.

HISTORY OF THE PROCEEDINGS

On December 15, 1981, Colorado-Ute Electric Association, Inc. (Colorado-Ute), filed with the Commission its Advice Letter No. 45. The purpose of the advice letter was to increase Colorado-Ute's annual revenues from its fourteen all-requirements members by approximately $11,120,603, or 12.157 percent. On January 12, 1982, the Commission entered Decision No. C82-75 whereby it established Case No. 6076 for the purpose of investigating the schedules filed by Colorado-Ute pursuant to its Advice Letter No. 45. As a result of amendments to CRS 1973, 40-3-102 and 40-6-108(1) and (2), the Commission may, at its discretion, set tariffs filed by an electric cooperative, such as Colorado-Ute, for hearing, and thereafter establish such rates, fares, tolls, rentals, charges, classifications, practices, rules, or regulations proposed, in whole or in part, or others in lieu thereof, which it finds just and reasonable. As a result of amendment to CRS 1973, 40-6-111, the Commission no longer has the authority to suspend

rates filed by electric cooperative associations. However, cooperative electric associations, such as Colorado-Ute, are not exempt from the other provisions of 40-6-111.[1]

The following parties were granted permission to intervene: San Luis Valley Rural Electric Cooperative ("San Luis Valley") by ER No. 82-38 dated February 2, 1982; Yampa Valley Electric Association, Inc. ("Yampa Valley") by ER No. 82-52, dated February 17, 1982; Intermountain Rural Electric Association ("Intermountain") by ER No. 82-53 dated February 17, 1982; Cheryl Muhovich by ER No. 82-54 dated February 17, 1982; White River Electric Association, Inc. ("White River") by ER No. 82-55, dated February 17, 1982; San Isabel Electric Association ("San Isabel") by ER No. 82-56, dated February 17, 1982; Sangre de Cristo Electric Association, Inc. ("Sangre de Cristo") by ER NO. 82-69, dated February 23, 1982; Grand Valley Rural Power Lines, Inc. ("Grand Valley") by ER No. 82-70 dated February 23, 1982; Delta-Montrose Electric Association, Inc. ("DMEA") and Holy Cross Electric Association ("Holy Cross") by Decision No. R82-292-I, dated March 12, 1982; Empire Electric Association, Inc. ("Empire"), City of Delta, Colorado, and Union Carbide Corporation by Decision No. R82-445-I, dated March 26, 1982; Western Slope Energy Research Center and Western Colorado Congress by Decision No. R82-545-I dated April 15, 1982; Shell Oil

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[1] Senate Bill 224, which became effective July 1, 1983, authorizes distribution rural electric cooperative associations to exempt themselves from this Commission's regulatory jurisdiction (subject to certain qualifications) upon vote of the members of such rural electric cooperative association. However, generation and transmission electric cooperative associations, such as Colorado-Ute, are not exempted or potentially exempted, by the provisions of Senate Bill 224.

Company by ER No. 82-263 dated July 9, 1982; San Miguel Power Association ("San Miguel") by Decision No. C82-1281 dated August 17, 1982; Exxon Company, U.S.A. by Decision No. C82-1439 dated September 14, 1982. Atlantic Richfield Company and Southeast Colorado Power Association ("Southeast") were granted permission to intervene by Commission order from the bench on October 6, 1982. Western Colorado Congress and Western Slope Energy Research Center were granted permission to withdraw as intervenors by ER No. 82-422 dated November 10, 1982.

Hearings were held before the Commission on October 6, 7, 8, 25, 26, November 15 and 16, 1982. Colorado-Ute sponsored the testimony of the following witnesses in its case in chief: Mr. Girts Krumins, Mr. Gene M. Harris, Mr. Robert J. Walker and Mr. Steven M. Foss; Intervenor DMEA presented the testimony of Messrs. Armstrong, Potter and Bussing; Intervenor White River presented testimony of Mr. Holeyfield; Intervenor Grand Valley presented testimony of Mr. Letey; Intervenor Sangre de Cristo presented testimony of Mr. Knudsen; Intervenor Holy Cross presented testimony of Mr. Grange; Intervenor Yampa Valley presented testimony of Mr. Golden; Intervenor Intermountain presented testimony of Mr. Lewandowski; Intervenor San Isabel presented testimony of Mr. Wood; Intervenor Southeast presented testimony of Mr. Bailey; and Intervenor San Luis Valley presented testimony of Mr. Sheppard. Public testimony was given by Messrs. Christenson, M. J. Mitchell, Moe, Myers, Felmlee, Walton, and Gosar. In its direct case, the Staff sponsored the testimony of Dr. William Loehr, Mr. Garrett Fleming, Mr. Warren Wendling and Mr. Bruce Mitchell. Colorado-Ute called the following witnesses on rebuttal: Messrs. Krumins, Harris, Pierson and Keith. The Staff called Mr. Wendling and Mr. Mitchell on

surrebuttal.[2] At the conclusion of the hearing, the subject matter was taken under advisement.

Submission

The herein instant matter has been submitted to the Commission for decision. Pursuant to the provisions of the Colorado Sunshine Act of 1972, CRS 1973, 24-7-401, et seq., and Rule 32 of the Commission's Rules of Practice and Procedure, the subject matter of this proceeding has been placed on the agenda for an open meeting of the Commission. At an open meeting, the herein Decision was entered by the Commission.

II.

JURISDICTION

On August 27, 1982, one of the Intervenors herein, namely, Intermountain, filed a "Motion of Intermountain Rural Electric Association to Dismiss for Lack of Jurisdiction." Intermountain, in essence, stated that this Commission does not have authority over the wholesale rates of Colorado-Ute because such authority would not be a constitutionally valid application of CRS 1973, 40-3-101, et seq., (which grants this Commission jurisdiction to regulate utility rates generally) in light of the commerce clause of Article 1, Section 8 of the United States Constitution. Oral argument on Intermountain's Motion to Dismiss was held on October 8, 1982, at the conclusion of the presentation of Colorado-Ute's direct case.

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[2] A list of exhibits which were tendered and admitted is attached to this decision as Appendix A.

The Commission will not burden the decision herein with extensive discussion of the jurisdictional issue. Suffice it to say that the Commission herein determines that it has regulatory jurisdiction over Colorado-Ute based upon the following three major propositions:

1. In Western Colorado Power Company v. Public Utilities Commission, 159 Colo. 262, 411 P.2d 785 (1966), the Colorado Supreme Court specifically held that Colorado-Ute was a "cooperative electric association" subject to the jurisdiction, control and regulation of this Commission. The Western Colorado Power case has never been modified or overruled by the Colorado Supreme Court. This Commission, in fact, has exercised regulatory jurisdiction over Colorado-Ute since 1961 when the Colorado Public Utilities Law was amended to specifically provide that, "every cooperative electric association is a public utility . . . subject to the jurisdiction, control and regulation of the commission and to the provisions of articles 1 to 7 (of the public utilities law)."

2. In its recent consideration of Senate Bill 224, the Colorado General Assembly had occasion to consider whether or not to exempt Colorado-Ute from the jurisdiction of this Commission. As initially proposed, Colorado-Ute would have been exempted by the provisions of Senate Bill 224 from the jurisdiction of this Commission. However, as finally enacted, Senate Bill 224 specifically excluded from its operation non-profit generation and transmission electric corporations or associations. Thus, it can be concluded the Colorado General Assembly desires that this Commission's jurisdiction of Colorado-Ute be continued.

3. Finally, on May 16, 1983, in the case of Arkansas Electric Cooperative Corporation v. the Arkansas Public Service

Commission, the United States Supreme Court, in a 7 to 2 decision, held that the Arkansas Public Service Commission's assertion of jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation to its members offends neither the Supremacy Clause nor the Commerce Clause of the United States Constitution. This Commission views the Arkansas case as "on all fours" with the situation involving Colorado-Ute in that the Arkansas Electric Cooperative Corporation is a customer-owned rural power cooperative, established with loan funds and technical assistance provided by the federal Rural Electrification Administration (REA) and which, like Colorado-Ute, does not provide power directly to consumers, but rather to its members who are seventeen smaller Arkansas rural power cooperatives which in turn serve the ultimate consumers. Although Arkansas Electric Cooperative Corporation is tied into an interstate "grid" arrangement with other producers, it obtains most of its energy from power plants located in Arkansas, which it wholly or partially owns, and sells most of what it generates to its member cooperatives. The basic fact pattern involving Colorado-Ute is not only substantially similar, but almost totally so. In a vein similar to that of the United States Supreme Court in the Arkansas case, neither the Federal Power Act of 1935, nor the Rural Electrification Act in 1936, pre-empts this Commission's regulatory jurisdiction over Colorado-Ute. Likewise we find that our in-state regulation of Colorado-Ute does not interfere with or impose unconstitutional burdens on interstate commerce.

Premises considered, this Commission states and finds that Intermountain's Motion to Dismiss for Lack of Jurisdiction should be denied.

III.

FINANCIAL ISSUES

A. Expense of Energy Delivered to Western Area Power Administration (WAPA)

In its income statement, Colorado-Ute reduced its operating expenses by $233,948, which was the value which it had assigned to energy delivered to Western Area Power Administration (WAPA) in lieu of a wheeling fee for non-members. In order to determine the proper value of energy delivered by Colorado-Ute to WAPA, the Staff reversed Colorado-Ute's adjustment of $233,948 by adding back that amount to the operating expenses on the income statement. In his cost of service study, Staff witness Wendling then adjusted the annual kwh billed to non-member sales by adding in the energy supplied to WAPA. The resulting annual kwh are utilized in the average and excess demand methodology of the cost of service study. The Staff contends that the proper expense of the energy delivered to WAPA in lieu of a wheeling fee is included in the total expense of $12,778,916 which the Staff's cost of service study indicated was attributable to non-member sales.

Colorado-Ute witness Harris contended that Staff witness Fleming's treatment of the $233,948 as an additional adjustment to Colorado-Ute's cost was inappropriate in that this amount has already been expensed as a cost in the books and records of Colorado-Ute to account 555 Purchased Power, interchanged on a monthly basis as the expense was incurred. Colorado-Ute witness Harris contends that Fleming's methodology has, in fact, doubled the expense by including it again. Colorado-Ute witness Harris contended that the only

treatment that would have been proper was to allocate this expense to non-member sales as a cost. The Commission states and finds that the Staff adjustment of the $233,948 was, in fact, improper and, accordingly, we do not adopt it.

B. Interest Expense Adjustment

The Staff made an adjustment to Colorado-Ute's income statement to reduce interest expense by $2,649,321. One component of this adjustment is a reduction of $1,430,983 equal to the annualized interest cost by the amount of the annualized interest income on a note from Mack Fuel Supply, Inc., held by Colorado-Ute. Another component is an [sic] reduction of $185,663 equal to the amount of the capital costs associated with the equity investment in Mack Fuel. A third component is a reduction of $1,032,675 equal to the annualized interest cost by the amount of the annualized interest expense associated with investment for preliminary survey and investigation purposes. A final component is a reduction in annualized interest cost by $201,883 which was made by Colorado-Ute and accepted by the Staff.

Mack Fuel Supply, Inc. is a partially owned subsidiary of Colorado-Ute engaged in the exploration and extraction of mineral resources, primarily coal. Colorado-Ute appears to agree with the Staff that neither the revenues earned nor the expenses incurred by Colorado-Ute from Mack Fuel operations should be considered for ratemaking purposes, since the operations of Mack Fuel are not those of a public utility and therefore not subject to the jurisdiction of the Commission. Colorado-Ute's members and ultimately their retail customers should not incur non-utility expenses such as interest expenses through the rates they pay. It is necessary to eliminate all non-utility expenses in order to calculate the proper Times

Interest Earned Ratio (TIER) which is used to gauge the reasonableness of revenue increases.

Colorado-Ute and the Staff agree that the interest income on a note from Mack Fuel to Colorado-Ute should be eliminated from Colorado-Ute's annualized interest cost. However, Colorado-Ute and the Staff disagree on the methodology for making that adjustment. The Staff first determined the annualized interest expense on total debt outstanding and then subtracted the annualized interest income on the note from Mack Fuel. Colorado-Ute also determined the same annualized interest expense on total debt outstanding but credited the actual interest income on the note from Mack Fuel to booked interest expense and then proceeded to add and deduct booked interest expense in deriving its adjusted annualized interest for ratemaking purposes. Colorado-Ute's methodology is incorrect for two reasons. First, the process of subtracting out and then adding back in the same booked interest income figure results in a wash and does not eliminate the Mack Fuel interest income from the adjusted interest expense. Second, the adjusted annualized interest expense must be calculated based upon the annualized interest income, and not the booked interest income, of the note from Mack Fuel. The note receivable from Mack Fuel is an asset on the balance sheet. Each asset must be supported by either liabilities such as debt or retained margins. Colorado-Ute updated its liabilities to year-end by using year-end total outstanding debt in its interest adjustment. To maintain a matching relationship, Colorado-Ute must also update its assets, including the Mack Fuel note, to year-end figures. Therefore the interest income on the Mack Fuel note which is based upon the year-end figure is annualized interest.

The Staff contends, and we agree, that the adjustment to interest expense to eliminate the capital cost supporting the equity investment in Mack Fuel is also proper for the reasons explained above. Mr Fleming testified that as of October 31, 1981, Colorado-Ute had a negative balance in the margin account on the balance sheet. In his opinion, if Colorado-Ute had not made the investment in Mack Fuel, the amount of debt necessary to cover negative margins would have been reduced. It is the Staff's position that debt supports the long-term investment in Mack Fuel since Colorado-Ute had no retained margins to provide cost-free funds. Even if Colorado-Ute had accumulated positive margins in excess of the investment in Mack Fuel, it is the Staff's position that an adjustment would still be necessary because it is unfair to allow non-utility investments to be made with cost-free funds while requiring utility ratepayers to pay high interest costs on debt-financed investments dedicated to utility service. Colorado-Ute witness Harris testified on rebuttal that the Staff's proposed interest adjustment for the equity investment in Mack Fuel should not be allowed. Mr. Harris' sole reason was that "Colorado-Ute has not associated or booked any interest expense for this investment on its books and records and therefore a credit adjustment as proposed by Mr. Fleming is not warranted". This statement misses the point that Colorado-Ute should have associated or booked such an interest expense (or made an adjustment for ratemaking purposes) for the reasons stated above.

Mr. Fleming also recommended that interest costs be reduced by the amount of interest costs associated with investment for preliminary survey and investigation (PS&I) purposes and that these charges be removed from rate base. It has been this Commission's practice to exclude PS&I charges from the investment base upon which a utility is allowed to

earn because these investments are not used and useful in providing utility service. Mr. Fleming testified that numerous projects in the PS&I account have either been dropped from Colorado-Ute's long range plan, rejected by the Commission in a CPCN application, or have not been submitted to the Commission for a CPCN. PS&I charges can be compared to research and development costs for competitive companies. Research and development costs are not recovered by competitive companies unless they result in a marketable product, and then only after sales of that product begin. The possibility that these expenses will never be recaptured, along with the delay between the expenditure of these costs and their recovery, necessitate that management carefully scrutinize such expenditures prior to their incurrence. No such constraints exist for Colorado-Ute if the Commission adopts Colorado-Ute's position that the interest expense for PS&I charges is a proper ratemaking expense. All risk of such expenses would be borne by the ratepayer, with no constraints on management. The position recommended by the Staff shifts the risk to management.

We also agree with the Staff that non-operating margins, except the loss on the equity investment in Mack Fuel, should be included in the calculation of Colorado-Ute's TIER and that amounts spent on sponsorships, donations, and political and civic activities should be removed from operating deductions. The Staff pro forma income statement for fourteen member operations is shown in the last column of Exhibit 45, Schedule 2, page 1. The Staff pro forma year-end rate base for fourteen member operations is shown in the last column of Exhibit 45, Schedule 3, page 1.

C. Times Interest Earned Ratio (TIER)

The Staff has recommended that the Commission approve the total revenue increase requested by Colorado-Ute herein. During the case, the Staff's calculation of the adjusted TIER achieved by Colorado-Ute on its member sales for the test year was .93. The requested revenue increase, as originally calculated by the Staff, would produce a TIER of 1.30. However, as a result of our not adopting Staff witness Fleming's adjustment to operating expenses with regard to energy delivered to WAPA, the recalculated TIER would be 1.31. We find that this TIER is reasonable under current circumstances and will provide Colorado-Ute with a margin of safety in meeting its indenture requirements.

The use of TIER to establish revenue requirements is primarily a function of utility liabilities. The determination of revenue requirements for other regulated utilities is primarily a function of utility assets. If TIER is used to determine revenue requirements, then the assets supported by debt should always be reviewed. The non-utility assets should be identified and the cost of debt supporting these assets should be eliminated from the TIER calculation. The failure to do this places the burden of supporting non-utility investments on the ratepayers.

In the past, this Commission has found that a TIER of 1.92 was reasonable for Colorado-Ute. We now believe that the 1.92 TIER should no longer be considered the benchmark for future decisions. A TIER which is adequate at one point in time may be either inadequate or excessive at some other time.

Mr. Fleming's Exhibit 45, Schedule 5, page 3, shows that a TIER of 1.92 applied to four different sets of circumstances for Colorado-Ute will result in operating ratios ranging from .87 in I&S Docket No. 1050 when that TIER was established to .72 if the investment in Craig 3 is classified as plant in service. The operating ratio of .87 would allow Colorado-Ute to increase expenses equal to 13 percent of revenues. The operating ratio of .72 would allow Colorado-Ute to increase expenses equal to 28 percent of revenues. The same TIER results in a rate of return on rate base of 7.04 percent in I&S Docket No. 1050 and 18.36 percent if the Craig 3 investment is included in rate base. Moreover, the regulatory climate has changed since the 1.92 TIER was established in I&S Docket No. 1050. Since that case, we have allowed Colorado-Ute to use year-end amounts in calculating the TIER and return on rate base, and regulatory lag has been significantly reduced with the passage of House Bill 1444. Because of these changed circumstances we believe that 1.92 TIER is no longer appropriate and that a reasonable TIER should be established on a case-by-case basis.

Mr. Krumins testified in Colorado-Ute's direct case, and Mr. Harris testified on rebuttal, that the Commission should establish a reasonable range for the TIER. They recommended the range of 1.5 to 3.0. Mr. Harris testified that this range was approved by Colorado-Ute's board of directors in August 1981 as a means to insure the financial integrity of Colorado-Ute. Colorado-Ute's proposal to use a range conforms to the Staff's position that the determination of TIER requirements should provide latitude to recognize Colorado-Ute's internal and external operating environment. However, Colorado-Ute has not demonstrated that the 1.5 to 3.0 range is reasonable. None of the distribution cooperatives listed in Exhibit 45, Schedule 6, page 1, have attained a TIER of 1.50. All of

these cooperatives are listed in Mr. Krumins' Exhibits 4 and amended 4 as having bonds rated in the A or AA class and therefore are viewed in a favorable light by rating agencies. In addition, Colorado-Ute has requested a revenue increase in this case which produces a TIER below the bottom of its recommended range. Thus, we do not find it necessary to announce a 1.5-3.0 TIER range for this case or future cases at this time.

IV.

COST OF SERVICE AND RATE DESIGN

It is obvious from the record that cost of service and rate design were the most hotly contested issues in this proceeding. The only cost of service study supplied in this docket was performed by the Staff of the Commission and was marked as Exhibit 58 and admitted into evidence. Colorado-Ute Electric Association did not submit a cost of service study. Colorado-Ute's President, Mr. Krumins testified that the flat energy rate is the appropriate rate design for the wholesale power which it supplies its member systems because Colorado-Ute's costs do not vary over time. Consequently, Colorado-Ute did not believe that it was necessary to file a cost of service study in the instant proceeding.

In Decision No. C81-373, issued February 24, 1981, the Commission approved the replacement of Colorado-Ute's then existing demand and energy rate schedules with rates providing for an equal and uniform energy charge per kilowatt hour to be applied to all energy purchased (Exhibit 5). The uniform or flat energy charge was designed to reflect average or per unit costs which, of necessity, include demand and energy costs. The resulting rate charged by Colorado-Ute has been

characterized in this proceeding as a "flat energy rate", an "energy-conservation rate", and "unit pricing". The flat rate structure has been in effect for all sales to the members of the Colorado-Ute system since March 1, 1981.

While there was extensive testimony regarding the costs and benefits of demand and energy rates at the retail level, the Commission finds that the scope of this proceeding was limited to a discussion of and an investigation into the justness and reasonableness of the tariffs accompanying Colorado-Ute's Advice Letter No. 45 filed with the Commission on December 15, 1981 and only those tariffs. The tariffs filed by Colorado-Ute relate only to the wholesale power rates charged by it to its members and not the rates charged by the fourteen member distribution cooperatives to their respective end-use customers. The appropriateness or non-appropriateness of employing demand and energy rates for all or some of their retail customers must be determined in proceedings specific to the involved distribution cooperative or cooperatives.[3] The utilization of a particular rate design at the wholesale level

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[3] However, the Commission would state that it has indicated in several orders, particularly its "generic" decision C79-1111, that it believes for particular end-use loads, such as residential and small commercial all electric space heating, a demand energy rate tracks the cost of providing service to them by the cooperative member systems. With regard to a number of rural electric distribution cooperatives, the demand-energy rate requirement is being re-examined in a consolidated hearing (Application No. 35295 and Case No. 5693) which is set to commence on August 11, 1983. Irrespective of the final outcome of those proceedings, however, we believe that is possible for retail distribution cooperatives to provide a reasonable explanation of a demand/energy rate to their individual retail customers.

does not necessarily preclude the selection of a different rate design or various rate designs at the retail level for individual customer classes. The wholesale/retail distinction is significant when viewed in the context of the benefits conferred by the clarity of the price signal provided a consumer through a specific rate design.

The Commission is aware of the rate designs in effect at both the wholesale and retail levels for Colorado-Ute and its member systems. Prior to March 1, 1981, Colorado-Ute sold wholesale power to its member systems via a demand and energy rate; during the same time frame, Colorado-Ute's member systems were charging their retail customers under various rate designs for different classes of service. The rate designs at the retail level included "declining block" rates, which became "two part" (customer charge and uniform energy charge) rates, "demand and energy" rates and "horsepower" rates for irrigation customers. Accordingly, as we have stated above, the selection of one form of rate design at the wholesale level does not necessarily dictate the choice of the use of the same rate form or forms at the retail level.

The Commission agrees with Colorado-Ute that an important, though not exclusive, objective of rate design is to provide a clear price signal that is understood by consumers. Since the consumers of Colorado-Ute's wholesale power are its fourteen member distribution cooperatives whose managers are knowledgeable and experienced in utility matters, a flat-energy rate is not the only rate design that is clearly understandable to Colorado-Ute's direct consumers. To the contrary, we believe that the wholesale customers of Colorado-Ute are quite capable of comprehending a demand and energy rate with a fixed customer charge as proposed by Staff in this proceeding. We agree with the testimony of Dr. Loehr in this regard. The

record in this proceeding does not support the conclusion, as testified to by certain general managers of distribution systems, that Colorado-Ute's wholesale rate design must be paralleled at the retail level for each rate class.

Colorado-Ute witness Krumins contended that the unique characteristics of its system and its resource management plan produce a flat load curve which indicates that its generation costs are uniform over all levels of output. Mr. Krumins testified that Colorado-Ute does not plan or construct generating facilities to meet its annual system peak. In contrast, in Colorado-Ute's last rate case, while under oath in I&S Docket No. 1452, Mr. Krumins advised this Commission that Colorado-Ute did build new plants to meet its system peak (Tr. Jan. 16, 1981, p. 204, ll., 4-7). This also is evidenced by the review of Colorado-Ute's fourteen member systems' individual maximum demands in relation to their contribution to the system peak, as testified to by Staff witness Mitchell. In fact, the generation plant of Colorado-Ute is constructed to provide a reliable source of power whenever the members demand it. Mr. Mitchell testified that for the month of February, 1981, the peak month for the test year filed by Colorado-Ute in this proceeding, approximately ten of the members peaked during the top five percent of the peak hours of the Colorado-Ute system. The coincident nature of the member systems' peaks to Colorado-Ute's system peak is further emphasized since twelve of the fourteen member systems are winter peaking utilities. The relationship between coincidence of peaks to demand-energy rates was explained by Staff witness Loehr who concluded that in those cases involving utilities where peak demand among various loads are highly coincident, a demand-energy rate is appropriate. The Commission finds, based on the factual evidence in this record, that the Colorado-Ute members exhibit a high coincidence of

demand with the Colorado-Ute system peak and that demand-energy rates are appropriate for Colorado-Ute.

In addition to the question of coincidence of peaks, the record contains a lengthy discussion of Colorado-Ute's resource management plan. As indicated above, Colorado-Ute witness Krumins contended that the combination of a flat energy rate and Colorado-Ute's resource management plan have resulted in a uniform cost per unit of output on a monthly basis, the operation of generation units at full capacity and a flat load curve. Exhibit 8, sponsored by Mr. Krumins in this proceeding, makes clear that during the test year total costs varied from 3¢/kwh in January to 4.3¢/kwh in October, a 1.3¢/kwh difference (or 43%); by 1982, the total cost varied from 3¢/kwh again in January to 4.5¢/kwh in June, a difference of 1.5¢ per kwh (or 50%). Therefore, the Commission must conclude from Colorado-Ute's own evidence that the total cost per unit of output has varied monthly.

The question of whether or not a utility system operates its generation units at or near their expected capacity levels is one of great concern to this Commission. The Commission has maintained a consistent policy in favor of the conservation of capital (as well as the conservation of energy). As early as its so-called generic Decision No. C79-1111, the Commission emphasized the need for avoiding unnecessary construction of costly generation facilities through such efforts such as load management, rate design, power pooling and direct conservation. The testimony of Mr. Krumins on "energy conservation" as it relates to rates, and more particularly the flat-energy rate, appears to address the conservation of energy, that is fuel, and not the conservation of capital. Upon questioning by the Commission in this proceeding, Mr. Krumins admitted as much (Tr. Oct. 6, 1982, Vol. IA, p. 101).

The Commission does not agree that there is a necessary and direct relationship between the conservation of energy and capital insofar as the conservation of energy in no way alters the amount of fixed plant already in service. The Commission does recognize that there is a relationship between the conservation of energy and other variable operating costs such as maintenance costs and labor costs. Exhibit 68, sponsored by Staff witness Mitchell, depicts a condition of a definite surplus of base load capacity at certain times which indicates that Colorado-Ute has not achieved uniform loading of capacity throughout the day. This condition results in an uneconomic under-utilization of capacity.

With regard to Colorado-Ute's resource management plan, we find that its effectiveness is not evident and both has contributed and has potential to continue to contribute to a growth in peak demands. The agreement between Colorado-Ute and Southern California Edison (SCE) demonstrates the problem pointedly. Exhibit 55, a letter agreement between Colorado-Ute and SCE, provides that delivery of fifty percent of the energy sold by Colorado-Ute to SCE is to occur during the peak load hours of Colorado-Ute. This can only mean an exacerbation of load requirements at precisely the time that generation plant is most constrained. In addition, Colorado-Ute's annual system load factor has deteriorated in recent years. Staff witness Loehr testified that Colorado-Ute's system load factor, 64.1 percent in 1980, an average load factor by industry standards, had declined to 58.1 percent in 1982, for a decline of 9.3 percent. Furthermore, Dr. Loehr forecasted a continuing decline in Colorado-Ute's system load factor through 1995. According to the testimony of Staff witness Mitchell, Colorado-Ute's load curve is not flat and according to the testimony of Staff witness Wendling, Colorado-Ute has

been unable to make non-member sales to fill in the valleys of its load.

The Commission accepts Colorado-Ute's contention that overall economic conditions, such as the recession and surplus energy in the region, has made it less able to sell energy to non-members so as to use its plants more efficiently. However, the Commission believes that the state of the economy both in the near and long term future as well as consumer response to economic change is imponderable at best. In any event, there was no evidence in the record to substantiate the overly optimistic assertion that economic recovery was just around the corner.

From time to time, it becomes necessary for a utility, such as Colorado-Ute, to meet its own peak demand by purchasing power from another utility, such as Public Service Company of Colorado. The record in the instant case reflects that the cost of such power, which is based on the capacity costs of base load units of the selling utility, Public Service, are as much as five times per kwh greater than the capacity costs associated with peaker units. This fact, coupled with the further fact that Colorado-Ute is unable to fill its valleys on its system, indicates that its resource management plan and associated flat energy rate are not working to the benefit of its ratepayers.

In order to improve the performance of the resource management plan, and to more fully substantiate a need for any future generation facilities, the Commission believes it will be beneficial for Colorado-Ute to investigate the implementation of a load research program. Such a program would result in enhancing the knowledge of both the Commission in rendering a decision with regard to rates, and Colorado-Ute in incorporating system load characteristics in its

planning efforts. A load research program should be able to provide at a minimum a general assessment of the magnitude and impact of the demands of the various customer classes in the distribution member systems. Such an investigation should include a thorough evaluation of the feasibility of load research data transferability among member systems, as well as among other utilities as recommended in the direct testimony of Staff witness Mitchell. A copy of the feasibility study is to be filed with this Commission six months from the effective date of this order.

Since the evidence in this record indicates that Colorado-Ute's total costs of generating a kilowatt hour are not unifrom over time, it follows that a flat or uniform energy rate is not cost tracking. To the contrary, a demand/energy rate provides separate and distinct recognition to the two major cost components of producing electricity: capital and fuel. The demand component recognizes the cost of plant in service necessary to meet load requirements and the demand charge is based on the member systems' share in using Colorado-Ute's plants. Staff witness Loehr testified that as much as two-thirds of Colorado-Ute's costs are capital related and that a demand charge should be part of Colorado-Ute's rate design. If the member systems are to receive accurate price signals, demand and energy costs must be distinguished.

Staff witness Wendling, as a result of his cost-of-service study of the fourteen Colorado-Ute members and one non-member, recommended and sponsored seasonally differentiated demand/energy rates. Mr. Wendling used an average and excess demand (AED) methodology for allocating production plant investment with coincident peak on the excess portion of the allocator. As mentioned previously, the cost of service study sponsored by Staff was the only cost of service study

offered and admitted into evidence in this case. The rate proposed by Staff as a result of the cost of service study is a demand/energy rate with seasonally differentiated demand charges for summer and winter and an annualized energy charge on a uniform kwh basis. The methodology employed by Staff followed cost of service principles that have been articulated and endorsed by this Commission in the past. The results of functionalizing customer demand and energy costs were depicted on Exhibit 60 which was admitted into the record.

Intervenor Atlantic Richfield Company (ARCO) and Exxon Company, U.S.A. (Exxon), while in general agreement with the Staff in this case, objected to the allocation of some $24,084,126 of the average demand revenue to the annualized energy charge. Intervenors ARCO and Exxon argue that these charges are appropriately assigned to the demand component of the rate and to include them in the energy charge will have the effect of distorting the price signal to the member systems by artificially depressing the true cost reflective of the investment in plant.

Staff witness Wendling testified that for generation costs only there should be a recognition of the utilities' investment in thermal coal-fired generation plants. Investment in such plants minimizes the cost of fuel relative to investment in peaking plants with its attendant low capacity or capital costs and high fuel costs for fuels such as oil or gas.

Mr. Wendling testified that Staff was surprised at the degree to which Colorado-Ute's generators were cycled to follow load. This dispatch pattern indicates that although these units are coal-fired, they are being used only partially for base load generation. Substantial portions of these units are being

used for peaking purposes. In effect, units with high capital costs and low running costs have been substituted for units with low capital costs and high running costs in meeting Colorado-Ute's load. Although such capital substitution may accord with the national energy policy, it nevertheless creates an artificially high demand charge and an artificially low energy charge. Moreover, no recognition is given to the off-peak use of base load capacity. One way to address these deficiencies is by the use of a time-of-use rate which would recognize the use of capacity at the times it occurs.

The disadvantage of a time-of-use rate, of course, is the increased complexity of metering and billing, and the need to perform cost allocation studies for the distribution cooperatives. As a surrogate for such a rate, Mr. Wendling proposed a modification of the demand-energy rate. In this modified rate, the dollars of generation costs associated with the average portion of the AED allocation were spread into the energy charge. Mr. Wendling testified that for the Colorado-Ute system, the amount so calculated approximated very closely the dollars of base load generation that would have been spread to all hours by a time-of-use rate. Mr. Wendling further testified that the energy charge of 2.7 cents per kilowatt hour produced by this method closely approximated the off-peak energy charge of 2.89 cents per kilowatt hour produced by a time-of-use analysis. Moreover, the off-peak energy charge produced by the time-of-use analysis showed only a de minimis variation from summer to winter so that a uniform energy charge tracks costs very well.

With the revenue requirement associated with base load generation transferred to the energy charge, only the excess portion of the AED allocation remained to be collected in the demand charge. For Colorado-Ute's particular load shape and

seasonality, the excess portion of the AED is a proxy for the peaking portion of the generating facilities. This peaking capacity was allocated on the basis of coincident peak demand recognizing that the members exhibit a high coincidence with the Colorado-Ute system peak. Placing only the excess portion of the AED allocation in the demand charge provides an automatic incentive to Colorado-Ute to improve its system load factor since the higher the load factor becomes, the higher is the proportion of generation costs collected in the energy charge and the lower is the demand charge. This provides the incentive to maintain and improve the system load factor that was absent in the flat energy rate. The use of the demand/energy rate, with that portion of the excess allocator reflecting demand charges associated with peak generation assigned to the demand charge, as sponsored by Staff in this proceeding, will provide Colorado-Ute with a strong incentive to raise its load factor. This should, if applied in conjunction with an effective resource management plan, produce essentially a flat rate, the very rate Colorado-Ute seeks to employ. This rate form has the additional advantage that, in the present application, it comports with the regulatory objective of rate stability.

The Commission finds, based on the evidence in the record, that the demand/energy rate (with attendant customer charge) proposed by Staff in this proceeding is the most cost tracking rate for the wholesale power charges of Colorado-Ute. The evidence indicates that:

1. Colorado-Ute's costs are not uniform over all levels of output;

2. the experimental flat energy rate provides a distorted price signal to member systems;

3. there has been a general deterioration of Colorado-Ute's load factor;

4. the resource management plan of Colorado-Ute has not met the objective of generating off-peak non-member sales for the purpose of filling in the valleys on Colorado-Ute's load curve;

5. the demand/energy rate more directly tracks costs than a flat rate;

6. the demand/energy rate provides an accurate price signal and assigns costs more directly to the cost causer; and

7. the assignment of a portion of generation costs from the average portion of the cost allocation methodology to the energy charge properly recognizes the benefits which accrue from a system constructed of low fuel cost generating units which are designed for base load operation.

CONCLUSIONS ON FINDINGS OF FACT

The Commission concludes that: (1) the Motion to Dismiss filed by Intermountain should be denied; (2) Colorado-Ute shall file demand energy rates for its wholesale electric customers with seasonally differentiated demand charges and an annualized energy on a uniform kwh basis as hereinafter ordered.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. The "Motion of Intermountain Rural Electric Association to Dismiss for Lack of Jurisdiction" filed on August 27, 1982, by Intermountain Rural Electric Association be, and hereby is, denied.

2. Colorado-Ute Electric Association, Inc., within thirty (30) days of the effective date of the decision and order herein shall file rates and tariffs reflecting the rates set forth in Appendix B attached hereto and incorporated herein.

3. Colorado-Ute Electric Association, Inc., shall submit to this Commission a feasibility study of a load research program, as discussed on pages 19 and 20 of the decision herein. Such feasibility study is to be submitted within six (6) months of the effective date of the decision and order herein.

4. The twenty (20) day time period provided for pursuant to CRS 1973, 40-6-114(1) within which to file an application for rehearing, reargument, or reconsideration shall commence to run on the first day following the mailing or serving by the Commission of the decision herein.

This Order shall be effective twenty-one (21) days from the day and date hereof.

DONE IN OPEN MEETING the 26th day of July, 1983.

(S E A L) THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

Commissioners

COMMISSIONER ANDRA SCHMIDT
NOT PARTICIPATING

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.

Harry A. Galligan, Jr.
Executive Secretary

Decision No. C83-1176
APPENDIX A

EXHIBITS OF PUBLIC WITNESSES

EXHIBIT NO.	
1	Homeowners Guide to Use of Demand Controllers
2	Comments of Dr. Moe - Dencor, Inc.
3	Testimony of Teresa Erickson
4	Testimony of Joe Pepi

EXHIBITS OF THE PARTIES

Exhibit	Description	Sponsored by
A.	Direct testimony of Girts Krumins	Colorado-Ute
B.	Direct testimony of Gene M. Harris	Colorado-Ute
C.	Direct testimony of Robert H. Walker	Colorado-Ute
D.	Direct testimony of Steven M. Foss	Colorado-Ute
E.	Prepared testimony of C. Ward Armstrong	Delta-Montrose

Exhibit	Description	Sponsored by
F.	Prepared testimony of David Potter	Delta-Montrose
G.	Prepared testimony of Richard W. Bussing	Delta-Montrose
H.	Prepared testimony of Joe Holeyfield	White River
I.	Prepared testimony of A. J. Letey	Grand Valley
J.	Prepared testimony of Norman Knudsen	Sangre De Cristo
K.	Prepared testimony of Ed Grange	Holy Cross
L.	Prepared testimony of James A. Golden	Yampa Valley
M.	Prepared testimony of Stanley R. Lewandowski, Jr.	Intermountain
N.	Prepared testimony of William W. Wood	San Isabel
O.	Prepared testimony of Norman Bailey	Southeast Colorado Power

Exhibit	Description	Sponsored by
P.	Prepared testimony of John Sheppard	San Luis Valley Rural Electric
Q.	Prepared testimony of Garrett Y. Fleming	Staff
R.	Prepared testimony of William Loehr	Staff
S.	Prepared testimony of Warren L. Wendling	Staff
T.	Prepared testimony of Bruce S. Mitchell	Staff
U.	Rebuttal Testimony of Girts Krumins	Colorado-Ute
V.	Supplemental Rebuttal Testimony of Girts Krumins	Colorado-Ute
W.	Rebuttal Testimony of Gene M. Harris	Colorado-Ute
X.	Rebuttal Testimony of Gary E. Pierson	Colorado-Ute
Y.	Rebuttal Testimony of Raymond E. Keith	Colorado-Ute

Exhibit	Description	Sponsored by
1.	GK-1 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
2.	GK-2 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
3.	GK-3 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
4.	GK-4 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
5.	GK-5 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
6.	GK-6 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
7.	GK-7 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
8.	GK-8 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
9.	GK-9 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
10.	GK-10 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute

Exhibit	Description	Sponsored by
11.	GK-11 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
12.	GK-12 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
13.	GK-13 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
14.	GK-14 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
15.	WSCC Power Supply Design Criteria	Staff
16.	REA Bulletin 112-5	Staff
17.	GH-1 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
18.	GH-2 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
19.	GH-3 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
20.	GH-4 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
21.	GH-5 Accompanying Direct Testimony of Gene Harris	Colorado-Ute

Exhibit	Description	Sponsored by
22.	GH-6 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
23.	GH-7 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
24.	GH-8 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
25.	GH-9 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
26.	GH-10 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
27.	GH-11 Statement of Income for 1st 8 months of 1982	Colorado-Ute
28.	Calculation of Annualized Interest	Staff
29.	RJW-1 Accompanying Direct Testimony of Walker	Colorado-Ute
30.	SMF-1 Accompanying Direct Testimony of Foss	Colorado-Ute
31.	SMF-2 Accompanying Direct Testimony of Foss	Colorado-Ute
32.	SMF-3 Accompanying Direct Testimony of Foss	Colorado-Ute

Exhibit	Description	Sponsored by
33.	DLP-1 Accompanying Testimony of Potter	Delta-Montrose
34.	DLP-2 Accompanying Testimony of Potter	Delta-Montrose
35.	DLP-3 Accompanying Testimony of Potter	Delta-Montrose
36.	DLP-4 Accompanying Testimony of Potter	Delta-Montrose
37.	DLP-5 Accompanying Testimony of Potter	Delta-Montrose
38.	DLP-6 Accompanying Testimony of Potter	Delta-Montrose
39.	3 Page Exhibit - Operating Data Holy Cross	Exxon
40.	Revenue from Ski Area Operators as a Percentage of total revenues for the year 1981	Holy Cross
41.	JAG-1 Accompanying Testimony of J. A. Golden	Yampa Valley
42.	JAG-2 Accompanying Testimony of J. A. Golden	Yampa Valley

Exhibit	Description	Sponsored by
43.	JAG-3 Accompanying Testimony of J. A. Golden	Yampa Valley
44.	Simplified WASP Flow Chart	Staff
45.	GYF Schedules 1 - 6 Accompanying Testimony of Garrett Y. Fleming (21 Pages)	Staff
46.	Copy of the original agreement for computer program services between DORA (cover page memo dated July 26, 1982) and Colorado School of Mines	Staff
47.	Subcontract between ENTEK and the Commission	Staff
48.	WL-1 Forecasts of Electrical Energy and Peak Power Demand for Colorado-Ute (144 Pages)	Staff
49.	WL-2 Documents Cited in CUEA Case (2 Pages)	Staff
50.	WL-3 Graph Corresponding Load Factor (1 Page)	Staff
51.	WL-4 Marginal Cost of Capacity per KWH (1 page graph)	Staff

Exhibit	Description	Sponsored by
52.	WL-5 Marginal Cost of Capacity: 3 Different Coincidence Factors (1 Page)	Staff
53.	WL-6 Marginal Cost of Capacity: 2 Different Peak Demands (1 Page)	Staff
54.	WL-7 Two Different Peak Demands and High Coincidence (1 page graph)	Staff
55.	WLW-1 Letter dated May 14, 1980 from Colorado-Ute to So. Calif. Edison Co. (6 Pages)	Staff
56.	WLW-2 Table of Sales at Time of Ute System Peak, Demand in KW (1 Page)	Staff
57.	WLW-3 Staff: Interchange Adjustment to Colorado-Ute (1 Page)	Staff
58.	WLW-4 CUEA Schedule 4A - Allocation of rate of return under proposed rates (3 pp w/addendum) Schedules (44 Pages)	Staff
59.	WLW-5 Electric Cost of Service Narrative (5 Pages)	Staff
60.	WLW-6 Staff Computation of Proposed Rate Tariffs of Colorado-Ute (8 Pages)	Staff

Exhibit	Description	Sponsored by
61.	WLW-7 WASP-82 Computer Program Description (4 Pages)	Staff
62.	WLW-8 Letter of May 4, 1982 from Colorado-Ute to Dr. Parkins (4 Pages)	Staff
63.	WLW-9 Report on Colorado-Ute (5 Pages)	Staff
64.	Rates Proposed by Staff and Rates proposed by Colorado-Ute.	Colorado-Ute
65.	FERC approved wholesale Rate Schedules of Public Service to various customers (19 Pages)	Colorado-Ute
66.	Simplified System Description CUEA	Exxon
67.	BSM-1 Review of Power Plant Performance Data C-U Hayden #1	Staff
68.	BSM-2 Review of Hourly Generation Patterns on Days of Maximum Requirements During Test Year	Staff
69.	BSM-3 Total Net Value of Distribution System Additions by Plant Account 1972-1981 CUEA	Staff
70.	BSM-4 Load Curves	Staff

Exhibit	Description	Sponsored by
71.	BSM-5 Cost of Compliance with Governmental Regulation	Staff
72.	SEC. 290.404 Title 18--Conservation of Power, Water Resources from Chapter I Federal Energy Regulatory Commission (pp 580-582)	Empire Electric
73.	Article "Service Area and Jurisdictional Variations in Factors Influencing Residential Electricity Demand" from Public Utilities Fortnightly (August 5, 1982, page 33)	Empire Electric
74.	REA Bulletin 45-2, Demand Tables - June, 1963 w/transmittal letter dated October 24, 1978 from REA to All Electric Borrowers	Empire Electric
75.	Wendling Diagram - Screening Costs	Staff
76.	GK-15 Monthly Load Factor, Acc. Rebuttal	Colorado-Ute
77.	GK-16 Day of Maximum Demand - Demand Curve, Acc. Rebuttal of Krumins	Colorado-Ute
78.	GK-17 Member Peak Diversity, Acc. Rebuttal	Colorado-Ute

Exhibit	Description	Sponsored by
79.	Comparison of Residential Heating Customers on Demand and Non-Demand Rates (Study and observations by M.E. Giddings for J. H. Ranniger) (27 Pages)	Colorado-Ute
80.	Bary Curve - as discussed by Colorado-Ute Witness Krumins in his rebuttal testimony (graph)	Exxon
81.	GEP-1 Accompanying Rebuttal of G. Pierson (3 Pages)	Colorado-Ute
82.	GEP-2 Accompanying Rebuttal of G. Pierson (5 Pages)	Colorado-Ute
83.	GEP-3 Accompanying Rebuttal of G. Pierson	Colorado-Ute
84.	Staff Cost-of-Service Study Based on Demand-Energy Rate	Exxon
85.	REK-1 Accompany [sic] Rebuttal Testimony of R. Keith	Colorado-Ute
86.	REK-2 Accompany [sic] Rebuttal Testimony of R. Keith	Colorado-Ute
87.	Rates proposed by Staff and Rates proposed by Colorado-Ute under investigation this case.	Staff

Exhibit	Description	Sponsored by
88.	Staff Exhibit (WLW-16) 18 Pages - Proposed rates Staff Computation	Staff
89.	Forecast with Demand & Energy Rate and Load Controller (graph)	Staff
90.	Daily Load Shape for Day of Annual System Peak (graph) 1971, 1981, 1991	Staff
91.	Daily Load Shape for Day of Annual System Peak (graph) 1981	Staff
92.	CUEA - Report for Utility Wed. November 8, 1982 (6 Pages)	Staff
93.	CUEA Incremental Cost and Benefit Analysis, Demand Energy Rates for New Electric Space Heating 1983 - 2001	Staff
94.	CUEA Review of Occurence [sic] of Member System Monthly Demands (4 Pages)	Staff
95.	Load Plot of CUEA for example Month of November 1980 (Hand-drawn diagram - Mitchell)	Staff

Exhibit	Description	Sponsored by
96.	14 Member Peak Demand, Member Demand at Time of 14 Peak Ratio Thereof	Colorado-Ute

All of the above listed exhibits were admitted into evidence.

LIST OF INTERVENORS

	Date Petition Filed	Granted
Upper Arkansas Area Agency on Aging	1-8-82	2-17-82
San Luis Valley Rural Electric Cooperative	1-29-82	2-2-82
White River Electric Association	2-4-82	2-17-82
Yampa Valley Electric Association	2-8-82	2-17-82
Intermountain Rural Electric Association	2-8-82	2-17-82
San Isabel Electric Association, Inc.	2-9-82	2-17-82
Western Slope Energy Research Center	2-16-82	4-15-82
Grand Valley Rural Power Lines, Inc.	2-19-82	2-23-82
Sangre De Cristo Electric Association, Inc.	2-23-82	2-23-82
Western Colorado Congress	2-23-82	4-15-82
Delta-Montrose Electric Association, Inc.	2-25-82	3-12-82

	Date Petition Filed	Granted
City of Delta, Colorado	2-26-82	3-26-82
Empire Electric Association, Inc.	2-26-82	3-26-82
Union Carbide Corporation	3-1-82	3-26-82
Shell Oil Company	6-10-82	7-9-82
San Miguel Power Association, Inc.	7-30-82	8-17-82
Exxon Co., USA	8-27-82	9-14-82
Holy Cross Electric Association	2-25-82	3-12-82
Southeastern [sic] Colorado Power Association	Orally allowed to intervene at hearing	
Atlantic Richfield	Orally allowed to intervene at hearing	

Decision No. C83-1176
APPENDIX B

Rates Proposed By Staff

Rate Schedule A	
Customer Charge	$593.00 per month
Summer Demand Charge (May 1 through September 30)	$4.27 per kw
Winter Demand Charge (October 1 through April 30)	$9.74 per kw
Energy Charge	$0.0279349 per kwh[2]
Energy Charge	$0.0279849 per kwh[1]
Rate Schedule B	
Customer Charge	$593.00 per month
Summer Demand Charge (May 1 through September 30)	$5.17 per kw
Winter Demand Charge (October 1 through April 30)	$7.01 per kw
Energy Charge	$0.0265230 per kwh[2]
Energy Charge	$0.0265730 per kwh[1]

Notes:

[1] Rate including Tariff Rider No. 1 if Colorado-Ute Electric Association, Inc. does the billing to its distribution electric cooperatives.

[2] Net effective rate.

(Decision No. C83-1392)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE INVESTIGATION OF THE SCHEDULES ACCOMPANYING ADVICE LETTER NO. 45 FILED BY COLORADO-UTE ELECTRIC ASSOCIATION, INC.	))))))	CASE NO. 6076 ORDER OF THE COMMISSION

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September 7, 1983

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STATEMENT AND FINDINGS

BY THE COMMISSION:

On July 26, 1983, the Commission entered Decision No. C83-1176 establishing a demand-energy rate structure for Colorado-Ute Electric Association, Inc. (Colorado-Ute) in the above-captioned case. The effective date for Decision No. C83-1176 was set for twenty-one days from July 26, 1983, or August 16, 1983. Ordering paragraph 2 of Decision No. C83-1176 provided that Colorado-Ute is to file within thirty days of the effective date of the decision, that is, on or before Septem-

ber 15, 1983, the rates and tariffs reflecting the rates as set forth in Appendix B attached to Decision No. C83-1176.

Various petitions and applications for rehearing, reargument and reconsideration have been filed by Colorado-Ute and other intervenor distribution cooperative members of Colorado-Ute, and industrial customers. These various applications and petitions are as follows:

1. Petition for Rehearing, Reargument and Reconsideration of Decision No. C83-1176 filed by San Luis Valley Rural Electric Cooperative, Inc.

2. Entry of Appearance and Application for Rehearing, Reconsideration or Reargument of Decision No. C83-1176 filed by San Miguel Power Association, Inc.

3. Application for Rehearing, Reconsideration and Reargument of Decision No. C83-1176 filed by Delta-Montrose Electric Association, Holy Cross Electric Association, Inc., and Yampa Valley Electric Association, Inc.

4. Application of Grand Valley Rural Power Lines, Inc., for Rehearing or Reconsideration of the Order of the Commission Dated 7-26-83 (Decision No. C83-1176) Establishing a Rate Structure for Colorado-Ute.

5. Motion for Reconsideration by Southeast Colorado Power Association.

6. Petition for Rehearing, Reargument, and for Reconsideration of Decision No. C83-1176 filed by Intermountain Rural Electric Association, Inc.

7. Application for Rehearing, Reconsideration or Reargument of Decision No. C83-1176 filed by Atlantic Richfield Company and Exxon Corporation.

8. Application for Rehearing, Reargument or Reconsideration of Decision No. C83-1176 filed by Colorado-Ute Electric Association, Inc.

9. Petition for Rehearing, Reargument and Reconsideration of Decision No. C83-1176 filed by San Isabel Electric Association, Inc.

10. Petition for Rehearing, Reargument and Reconsideration of Decision No. C83-1176 filed by The Gunnison County Electric Association, Inc.

11. Application for Rehearing, Reargument or Reconsideration of Decision No. C83-1176 filed by Sangre de Cristo Electric Association, Inc.

12. Application for Rehearing, Reconsideration and Reargument of Decision No. C83-1176 filed by White River Electric Association, Inc.

13. Application for Rehearing, Reargument or Reconsideration filed on Behalf of Empire Electric Association, Inc.

14. Application for Rehearing, Reargument and Reconsideration filed by La Plata Electric Association, Inc.

The Commission states and finds that the various petitions and applications for rehearing, reargument or reconsideration, as set forth above, do not set forth sufficient factual and legal grounds for the granting thereof, and accordingly, except as hereinafter noted, the same shall be denied. However, we do believe that it would be appropriate to comment on the following issues that have been raised. First, it has been argued by Colorado-Ute that the decision setting its filed rates for hearing did not give Colorado-Ute notice that the Commission intended to review Colorado-Ute's rate design. We believe it is entirely too late to raise the issue of inadequate notice at this late juncture in the proceeding. If, in fact, Colorado-Ute had been "surprised" by the fact that the Commission intended to hear testimony and receive exhibits from the Staff of the Commission on the issue of rate design, Colorado-Ute was perfectly free to file an appropriate motion, at the beginning of this proceeding, to limit the scope of the hearing herein. Colorado-Ute did not do this. Colorado-Ute cannot fairly go through an entire proceeding, in which the most hotly contested issue was rate design, obtain a decision which is not to its liking, and then turn around and claim that it had no notice of the fact that rate design was to be a part of the hearing herein. In any event, the phraseology of the decision instituting Case No. 6076 wherein the Commission found that "it should set the above-cited schedules . . . for hearing because of the important impact on its electric distribution members" is sufficiently broad as to fairly inform Colorado-Ute that all matters relating to its filed rate schedules would be subject to hearing. The fact that the Commission further found, in its decision setting

Case No. 6076 for hearing, that Colorado-Ute's schedules may be improper because of changing financial conditions, cannot by any stretch of the imagination be taken as limiting the scope of the hearing to "changing financial conditions" only. Accordingly, Colorado-Ute's discomforture over what it believes to be a lack of notice is not well taken.

Second, Colorado-Ute claims that inasmuch as Decision No. C83-1176 did not use the "magic" words in finding that Colorado-Ute's schedules were unjust and unreasonable, and that the rates that were ordered to be instituted by the Commission, in lieu thereof, were "just and reasonable", that the Commission has exceeded its powers. The contention, of course, is facetious inasmuch as the Colorado Supreme Court in the case of Aspen Airways, Inc. v. Public Utilities Commission, 169 Colo. 56, 453 P.2d 789 (1969) has stated that findings of the Commission need not take any particular form. It is also true that certain findings of the Commission may be implied. Caldwell v. Public Utilities Commission, ___Colo.___, 613 P.2d 328, 333 (1980); Colorado Municipal League v. Public Utilities Commission, 172 Colo. 188, 472 P.2d 960 (1970); City and County of Denver v. People, ex rel. Public Utilities Commission, 129 Colo. 41, 46, 226 P.2d 1105 (1954).

Notwithstanding Colorado-Ute's contention, unsupported by any case law, that this Commission cannot "cure" Decision No. C83-1176 by amending it to include "cursory" findings that Colorado-Ute's rate structure was "unjust, unreasonable, discriminatory, preferential or in violation of law," since, in Colorado-Ute's view, the record does not contain any competent evidence that a unit pricing rate, which charges everyone the same cents per kilowatt hour, is unjust, unreasonable, discriminatory, preferential, or in violation of law, we shall none the

less explicitly state that Colorado-Ute's rate structure is in fact unjust, unreasonable, discriminatory, and preferential, in that its unit pricing rate is not cost tracking for the reasons set forth in Decision No. C83-1176. By the same token, we explicitly find that the rate schedule proposed by the Staff of the Commission, as a result of its cost of service study, being a demand-energy rate with seasonally differentiated demand charges for summer and winter and an annualized energy charge on a uniform kwh basis, is more nearly cost tracking than that proposed by Colorado-Ute, and accordingly, the Staff rate is, in fact, just and reasonable and should be adopted.

Third, Colorado-Ute argues a due process violation on the basis of the Staff's refusal to provide Colorado-Ute with a copy of the WASP-82 analysis which, according to Colorado-Ute, foreclosed it "any opportunity to effectively cross-examine Staff witness Wendling." In fact, as Colorado-Ute knows, the record clearly establishes that the Commission went out of its way to accommodate Colorado-Ute's concerns in this regard by encouraging a full exchange of information between the Staff and Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature thereof. The Commission has reviewed the transcripts of this proceeding, and especially those portions relating to the dialogue between the Staff, Colorado-Ute, and the Commission relating to the WASP-82 program. The bottom line is that Colorado-Ute employee Raymond Keith, on the record, was explicitly asked by the Chairwoman of the Commission "Is that (referring to the information to be supplied by the Staff of the Commission to Colorado-Ute) going to give you sufficient time to analyze and to do what needs to be done?" Mr. Keith replied: "I believe it will. The only thing I can think of would be some clarification on the part of the print-outs that can be handled by either direct conversation or

by telephone, but I don't think I'll need any additional paper prepared."

Colorado-Ute cannot have it both ways. It agreed, on the record, that the information that would be given to it by the Staff would enable it to have sufficient time to analyze and to do what needed to be done. It cannot now claim that it was disadvantaged notwithstanding its counsel's pro forma objection on the record. (See October 26, 1982 transcript, p. 61).

Intervenors Atlantic Richfield Company (ARCO) and Exxon Company, U.S.A., a division of Exxon Corporation (Exxon), in their application for rehearing, reconsideration or reargument, inter alia, requested that the Commission clarify its intention with respect to monthly billing demand integration. ARCO and Exxon request that the Commission order monthly billing demand to be integrated over all delivery points for each Colorado-Ute member, rather than billing based upon the maximum demands of each delivery point meter for the particular member. ARCO and Exxon also request that this Commission specifically order no demand ratchet provisions are to be applied to the proposed Colorado-Ute member customer energy demand rates. We find that these two requests by ARCO and Exxon are reasonable and should be granted. Accordingly, we shall, in the order hereafter, add a third footnote to Appendix B to Decision No. C83-1176, which will provide for the needed clarification.

The Commission states and finds that other legal or factual arguments raised by various parties herein in their respective petitions or applications for rehearing, reargument or reconsideration, do not set forth sufficient factual or legal grounds for the granting thereof and that the same should be denied.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. Except as hereinafter indicated, the various petitions or applications for rehearing, reargument or reconsideration filed by various parties herein, as set forth in the decision above, be, and hereby are, denied.

2. Appendix B to Decision No. C83-1176 is amended to add a third footnote thereto which shall read as follows:

> [3] For purposes of monthly billing demand, said demand is to be integrated over all delivery points for each Colorado-Ute Electric Association member and shall not be based upon the maximum demand of each delivery point meter for the particular Colorado-Ute Electric Association member. No demand ratchet provisions are to be applied by Colorado-Ute Electric Association with respect to the customer energy demand rates herein.

3. The stay of ordering paragraph 2, as contained in Decision No. C83-1176, said stay having been ordered by Commission Decision No. C83-1391, dated September 7, 1983, be, and the same hereby is, dissolved as of October 7, 1983.

4. Decision No. C83-1176 is modified pursuant to this decision, and as so modified, subject to the provisions of CRS 1973, 40-6-114(1).

5. The twenty (20) day time period provided for pursuant to CRS 1973, 40-6-114(1) within which to file an application for rehearing, reargument, or reconsideration shall commence to run on the first day following the mailing or serving by the Commission of the decision herein.

This Order shall be effective twenty-one (21) days from the day and date hereof.

DONE IN OPEN MEETING the 7th day of September, 1983.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

ANDRA SCHMIDT

Commissioners

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.

Harry A. Galligan, Jr.
Executive Secretary

(Decision No. C83-1561)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE INVESTIGATION OF THE SCHEDULES ACCOMPANYING ADVICE LETTER NO. 45 FILED BY COLORADO-UTE ELECTRIC ASSOCIATION, INC.	) CASE NO. 6076	) ORDER OF THE COMMISSION

October 4, 1983

STATEMENT AND FINDINGS

BY THE COMMISSION:

Applications for rehearing, reconsideration and reargument of Commission Decision No. C83-1392 were filed by Delta-Montrose Electric Association, Holy Cross Electric Association, Inc., Yampa Valley Electric Association, Inc., White River Electric Association, Inc., Colorado-Ute Electric Association, Inc., Atlantic Richfield Company, Exxon Company, U.S.A., Southeast Colorado Power Association, Empire Electric Association, Inc., La Plata Electric Association, Inc., Intermountain

Rural Electric Association, Sangre de Cristo Electric Association, Inc., Grand Valley Rural Power Lines, Inc., San Isabel Electric Association, Inc., San Luis Valley Rural Electric Cooperative, Inc., Gunnison County Electric Association, Inc., and a late-filed application for rehearing by San Miguel Power Association, Inc. In addition, Colorado-Ute Electric Association, Inc. filed a motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392.

After review of the applications for rehearing, reargument and reconsideration filed by the above-named parties, the Commission states and finds that no new grounds have been shown to persuade the Commission to grant the relief requested in these applications. Accordingly, these applications will be denied.

In regard to the motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392 filed by Colorado-Ute Electric Association, Inc., the Commission finds that CRS 1973, 40-6-114, which provides authority to the Commission to stay a Commission decision upon the filing of application for rehearing, reargument or reconsideration of a decision, does not apply to the instant proceeding because the Commission has considered and reviewed all pending applications for rehearing, reargument or reconsideration of Commission Decision No. C83-1392 and has determined to deny such.

The Commission also states and finds that insufficient grounds have been set forth by Colorado-Ute to grant the motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392. The

Commission will further order that response time to the motion to stay the filing date for rates and tariffs should be waived in that Colorado-Ute is now required to file such rates and tariffs by October 7, 1983 and response time to such motion will expire on October 6, 1983. Accordingly, the motion to stay the filing date for rates and tariffs should be denied, and responses to such motion will be waived by the order to follow.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. The applications for rehearing, reconsideration and reargument filed by Delta-Montrose Electric Association, Holy Cross Electric Association, Inc., Yampa Valley Electric Association, Inc., White River Electric Association, Inc., Colorado-Ute Electric Association, Inc., Atlantic Richfield Company, Exxon Company, U.S.A., Southeast Colorado Power Association, Empire Electric Association, Inc., La Plata Electric Association, Inc., Intermountain Rural Electric Association, Sangre de Cristo Electric Association, Inc., Grand Valley Rural Power Lines, Inc., San Isabel Electric Association, Inc., San Luis Valley Rural Electric Cooperative, Inc., Gunnison County Electric Association, Inc., and late-filed application by San Miguel Power Association, Inc., are hereby denied.

2. The motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392 filed by Colorado-Ute Electric Association, Inc., is hereby denied.

3. Response time to the motion filed by Colorado-Ute Electric Association, Inc. to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392 is waived.

This Order shall be effective forthwith.

DONE IN OPEN MEETING the 4th day of October, 1983.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

ANDRA SCHMIDT

Commissioners

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.

Harry A. Galligan, Jr.
Executive Secretary

SUPREME COURT, STATE OF COLORADO
Case No. 86 SA 244 and 86 SA 246
APPEALS FROM THE DISTRICT COURT, MONTROSE COUNTY, NOS. 83CV218 & 84CV007

ORDER OF COURT

COLORADO-UTE ELECTRIC ASSOCIATION, et al,
Petitioners-Appellees,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,
Respondent-Appellant,

and

SHELL OIL COMPANY; et al,
Respondents-Appellees, 86 SA 244

and

ATLANTIC RICHFIELD COMPANY AND EXXON CORPORATION,
Petitioners-Appellees,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; et al,
Respondents-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
Respondent-Appellee.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; et al,
Appellees,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; et al,
Appellants,

86 SA 246

and

ATLANTIC RICHFIELD COMPANY AND EXXON CORPORATION,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; et al,
Appellees.

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

BY THE COURT. EN BANC. AUGUST 15, 1988.
Justices Erickson, Lohr and Vollack would grant the Petition for Rehearing of the Public Utilities Commission.

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SUPREME COURT, STATE OF COLORADO
Case Nos. 86SA244 and 86SA246

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Case No. 86SA244

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC

RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondent-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

Case No. 86SA246

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Notice is hereby given that Colorado-Ute Electric Association, Inc. (Colorado-Ute) and 13 of the 14 rural electric distribution cooperatives who are its members,[1] (hereinafter called "the Thirteen Members") the appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Colorado entered August 15, 1988 denying Colorado-Ute's and the Thirteen Members' petitions for rehearing of the Supreme Court of the State of Colorado's July 11, 1988 opinion which reversed in part and affirmed in part the decision of the Colorado district court.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2), prior to its amendment by Section 7 of the Act of June 27,

---

[1] The 13 appellants are Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre de Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; San Miguel Power Association, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; and Yampa Valley Electric Association, Inc.

1988, 102 Stat. 664, P.L. 100-352.

Respectfully submitted,

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Dated: November 1, 1988

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of November, 1988, I mailed a true and correct copy of the foregoing Notice Of Appeal To The Supreme Court Of The United States by placing a copy thereof in the United States mail, postage prepaid, addressed to the following:

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SUPREME COURT, STATE OF COLORADO
Case Nos. 86SA244 and 86SA246

COLORADO-UTE'S PETITION FOR REHEARING

Case No. 86SA244

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondent-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

Opinion by Honorable Luis D. Rovira
EN BANC

Case No. 86SA246

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

Opinion by Honorable Luis D. Rovira
EN BANC

Appellee, Colorado-Ute Electric Association, Inc. (Colorado-Ute), pursuant to C.A.R. 40 submits the following Petition for Rehearing and as grounds therefor states as follows.

INTRODUCTION

Colorado-Ute is filing this Petition seeking Rehearing of the Court's Opinion affirming in part and reversing in part the order of the district court which set aside the decision of the Public Utilities Commission (PUC). Colorado-Ute believes that this Court's decision was erroneous in that it failed to properly consider a number of issues essential to a just result. In the remainder of this Petition, Colorado-Ute will discuss each issue individually in order to demonstrate that the grant of this Petition is warranted under the circumstances.[1] Given the required brevity of this Petition, Colorado-Ute requests the opportunity to brief each of these arguments in greater detail for the Court's reference.

LEGAL ARGUMENT

I. THE PUC'S ADMISSION OF EVIDENCE CONCERNING AND DERIVED FROM THE WASP-82 COMPUTER PROGRAM WAS ERRONEOUS AND CONSTITUTED A DEPRIVATION OF DUE PROCESS.

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[1] Due to page restrictions, this Petition is limited to discussion of certain key constitutional and other issues. Other important issues are discussed in a Supplemental Petition which has been conditionally filed herewith.

During the course of the PUC hearings, the PUC allowed the results of certain computer analyses referred to by the PUC Staff (Staff) as the WASP-82 analyses to be admitted into evidence over Colorado-Ute's objection. Colorado-Ute objected to the admission of such evidence as a result of the Staff's refusal to provide Colorado-Ute with access to the WASP-82 program and supporting documentation. Colorado-Ute's motion for such access was denied by the PUC. This issue is significant in that the decision of the PUC and by extension of this Court rests almost wholly on the conclusions derived from the use of the WASP-82 program.[2]

Colorado-Ute acknowledges that this issue, although addressed in the district court, was not specifically raised before this Court. This is not surprising. Although the district court did not rule in Colorado-Ute's favor on the WASP-82 issue, Colorado-Ute nevertheless prevailed on the main issue (flat rate/demand rate) and was the Appellee before this Court.

Under the circumstances, a cross-appeal of the district court's WASP-82 decision was unnecessary. As the Appellee, Colorado-Ute's primary concern was to respond to the issues raised by the Appellants. In addition, in a subsequent case,[3] the PUC excluded evidence derived from a later version of WASP-82 on the basis that the parties' due process would be violated by the Staff's denial of the program documentation.

---

[2] For example, the cost-of-service study upon which this Court placed such reliance was the result of the WASP-82 program.

[3] In the Matter of the General Investigation of Costing Methodologies and Rate Structures of Electric Utilities, Case No. 6130.

Consequently, Colorado-Ute had reason to believe that the WASP-82 issue was resolved.[4] Given this Court's ultimate decision, however, it is imperative that this issue now be given due consideration.

Colorado-Ute's arguments in support of the inadmissibility of the WASP-82 program were thoroughly presented in the district court[5] and in Colorado-Ute's Applications for Rehearing, Reargument or Reconsideration. Without access to the computer program itself and supporting documentation, Colorado-Ute was unable to effectively cross-examine the testimony of the Staff.

Because of the property rights at stake, the Staff's refusal to provide the information is more than a mere evidentiary question. The failure of the PUC to afford Colorado-Ute the right to review the evidence used against it to justify the imposition of restrictions on its conduct constitutes a deprivation of due process. This deprivation of due process raises constitutional issues requiring full consideration by this Court on rehearing. Moreover, the failure of the Staff to provide the requested information was in violation of C.R.S. 24-72-204, the Colorado Open Records Law.

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[4] The PUC has now specifically included "computer records" within its definition of "public records" which the PUC must make available. See, PUC Rules of Practice and Procedure, Rule 5(b)(11).

[5] See Opening Brief of Colorado-Ute Electric Association, Inc., (Rec. Vol. II, pp. 356-364).

II. THE PUC SHOULD REHEAR THE CASE IN ORDER TO IMMEDIATELY DECIDE THE REFUND ISSUE.

In its Opinion, the Court noted that certain parties have requested an Order directing Colorado-Ute to refund amounts allegedly overpaid. The Court has not decided this question, although it is submitted by Colorado-Ute that it is an issue capable of determination as a matter of law. Since the refund issue is certain to come up again and may be the subject of further appeals, it is Colorado-Ute's belief that the Court will best serve justice by reaching that decision now rather than requiring the parties to wait as much as another seven years. In addition, since the refund issue was a factor in this Court's decision regarding mootness, if the Court were to rule that refunds were not due, the mootness issue would be ripe for reconsideration.[6]

With respect to the merits of the issue, it is Colorado-Ute's firm belief that refunds would be neither logical nor legal. The oil company parties are not customers of Colorado-Ute, rather they are retail customers of certain members of Colorado-Ute. Obviously, Colorado-Ute can only provide refunds to its direct customers who, incidentally, favor the flat rate and do not want refunds. Moreover, if such refunds were to be ordered, Colorado-Ute would have to obtain the necessary money from some other source since the rates ordered by the PUC would provide it with no excess revenues for this purpose. Ultimately the other customers would be

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[6] The mootness issue is further discussed in Colorado-Ute's Supplemental Petition conditionally filed with this Petition.

forced to bear the burden of such refunds in the form of increased rates. Such refunds would result in unlawful retroactive ratemaking and would constitute an unconstitutional confiscation of the property of Colorado-Ute and its members.

III. THE RURAL ELECTRIFICATION ADMINISTRATION'S APPROVAL OF THE FLAT RATE PREEMPTS THE PUC'S JURISDICTION TO ORDER COLORADO-UTE TO IMPLEMENT INCONSISTENT RATES.

The Rural Electrification Administration (REA), an agency of the federal government, approved the flat rate proposed by Colorado-Ute.[7] According to Colorado-Ute's mortgage with the United States, the approval of its rates is a prerequisite to their implementation.[8] It is well settled that a state commission may not impose regulations that conflict with those promulgated by the REA. See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 103 S.Ct. 1905, 76 L. Ed. 2d 1 (1983). Consequently, the PUC had no right to impose rates on Colorado-Ute inconsistent with those approved by the REA.[9]

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[7] Tr. Vol IA, p. 70. A copy of this testimony is attached hereto for the Court's reference.

[8] Tr. Vol IA, p. 70.

[9] This issue is set forth in more detail in Colorado-Ute's Application for Rehearing, Reargument or Reconsideration, dated August 15, 1983 at 32-33.

This issue was not raised in this Court. As stated in Section I above, Colorado-Ute, as the Appellee, had no reason to raise this issue until this Court's decision. In light of the decision, however, it is critical that this issue be decided by the Court.

IV. THERE ARE OTHER CONSTITUTIONAL QUESTIONS THAT HAVE NOT BEEN CONSIDERED BY THE COURT THAT REQUIRE REHEARING

As pointed out in Colorado-Ute's Application for Rehearing, Reargument or Reconsideration in Case 6076, the PUC decision interfered with Colorado-Ute's constitutional rights in a number of ways, none of which were considered by this Court. For example, the PUC failed to give Colorado-Ute proper notice that it intended to review Colorado-Ute's rate structure.[10] Additionally, the PUC's decision imposes an undue burden on interstate commerce.[11]

These issues were not raised below for the same reason that the WASP-82 issue was not; under the circumstances, it was simply unnecessary. Now, however, in order to comport with the principles of fundamental fairness, this Court must afford Colorado-Ute an opportunity to present this evidence and have it fully considered.

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[10] See Colorado-Ute's Application for Rehearing, Reargument or Reconsideration, dated August 15, 1983 at 22-23.

[11] See Colorado-Ute's Application for Rehearing, Reargument or Reconsideration, dated August 15, 1983 at 33-34.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant Colorado-Ute's Petition for Rehearing for the purpose of reconsidering the issues raised herein and for such other purposes as the Court deems proper.

Dated: July 25, 1988

Respectfully submitted,

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

By: */s/ John R. McNeill*

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Colorado-Ute to the Rural Electrification Administration of the Department of Agriculture?

A Oh, the relationship is that we are what is called a borrower. The principal source of financing in the past came from insured loans of REA under a mortgage, which is a very tough mortgage and puts a lot of requirements on Colorado-Ute. And another source of funding comes through the guaranteed program of the REA. And we have loan contracts and mortgages that impose a number of requirements on us. So that is basically our relationship.

Q Does the REA have any requirement with regard to your rate structure?

A Yes, the REA requires that any time we want to change our rates we have to give notice under the mortgage, and they have the right to approve or disapprove that rate. Any rate, any wholesale rate we have to our members is subject to the approval of REA.

Q Is that a review procedure that you have undertaken in connection with the flat rate now in effect?

A The rate that is now in effect has been approved by REA, as was the one before that. All our rates have been always approved by the REA. That is a requirement.

MR. BANTA: I have no further questions.

CHAIRWOMAN MILLER: Thank you, Mr. Banta. Before I turn it over to Mr. Archibold, is there any other

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SUPREME COURT, STATE OF COLORADO
Case Nos. 86SA244 and 86SA246

COLORADO-UTE MEMBERS PETITION FOR REHEARING

SUPREME COURT, STATE OF COLORADO
Case No. 86SA244

COLORADO-UTE ELECTRIC ASSOCIATION, INC.;DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC

RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondent-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

SUPREME COURT, STATE OF COLORADO
Case No. 86SA246

COLORADO-UTE ELECTRIC ASSOCIATION, INC.;DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC

ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION,; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION;

WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

Opinion by Honorable Luis D. Rovira
EN BANC

The Thirteen Cooperative Associations, Members of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), which are listed below, respectfully request that the Supreme Court grant rehearing in these matters. The Members of Colorado-Ute are the only customers directly affected by the Court's decision and they are aggrieved by the results of that decision. In that the PUC found that Colorado-Ute's revenue increase was justified, Colorado-Ute will presumably receive the same revenues under any rate structure. The choice of rate structure will however, affect the customers, the Members of Colorado-Ute. It is their interests which are at issue. And they unanimously preferred the flat energy rate structure. The adverse effects of rate structure, either demand-energy or flat,

will be borne by the Members. And, as electric utilities, they have knowingly and willingly chosen the flat energy rate structure. In support of its petition, the Members note the following.

1. The Decision of the Public Utilities Commission and the Decision of this Court failed to note the impact of those Decisions on the 14 Members of Colorado-Ute, the only affected customers, in contravention of the purpose of the Public Utilities Law.

The purpose of the Public Utilities Law is to protect customers from unjust or unreasonable tolls or changes and preferential or discriminatory rates or charges. In these matters (both arising from the same decisions of the PUC), none of the affected customers, the 14 Colorado-Ute Members, complained about the flat energy rate structure utilized by Colorado-Ute. Rather, all of the customers who appeared testified about the adverse affects of a demand-energy structure and their

preference for a flat energy rate structure.[1] The Court, in failing to note this evidence, has affirmed a PUC order which was entered over the objection of all the affected customers and their power supplier. All of the affected customers, who testified, offered evidence as to the reasonableness and justness of the flat energy rate structure and the unreasonableness and injustice of the demand-energy rate structure.

The mere finding by the PUC that a demand-energy rate structure is the "most cost tracking" does not establish that the flat energy rate structure is so unwarranted as to be unjust, unreasonable, preferential or discriminatory. The affected customers, (who are themselves electric utilities) have said that the flat energy rate structure is the preferred rate structure. In Colorado, it is the utility which files rates. While the PUC may suspend such rates for utilities, which are not electric cooperatives, it may not substitute its judgment for that of the utility, unless the utility's rates are unjust, unreasonable, discriminatory or preferential.

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[1] See Testimony on behalf of the following Member Associations: Delta-Montrose (Tr. Oct 7, 1982, 10:00 a.m., p.216-221,); (Tr. Oct. 7, 1982, 10:00 a.m., p.280-282), (Tr. Oct. 7, 1982, 7:00 p.m., p.37-39); White River, (Tr. Oct. 7, 1982, 7:00 p.m., p.52-54,); Grand Valley (Tr. Oct. 7, 1982, 7:00 p.m., p.70-72,); Sangre de Cristo, (Tr. Oct. 7, 1982, 7:00 p.m., p.85-86,); Holy Cross (Tr. Oct. 8, 1982, p.35-44,); Yampa Valley (Tr. Oct. 1982, p.84-87, p.88-93,), Intermountain (Tr. Oct. 8, 1982, p.155-156,), San Isabel (Tr. Oct. 8, 1982, p.162-163,); and Southeast (Tr. Oct. 8, 1982, p.168-270).

Counsel respectfully notes that Sec. 40-6-111(4)(a) C.R.S., as interpreted by the Members - i.e. it sets forth a self-contained and exclusive method for review of rate filings of cooperative electric associations - was intended to avoid this result. Where the electric cooperative and all of its member-consumers are in agreement as to the rate, charge, rule or regulation, the PUC should not interfere.

The purpose of the Public Utilities Law is to balance the right of the utility to earn a reasonable return on its investment and the right of the customers to just, reasonable, non-preferential and non-discriminatory rates. Where the utility and its customers are in unanimous agreement, the PUC is not authorized to disturb that balance.

2. In affirming in part and remanding for further proceedings consistent with its order, this Court has denied due process to the Members in violation of the 14th Amendment of the U.S. Constitution and Act II, Section 25 of the Colorado Constitution.

The rate structure, under review by the PUC in this matter, affects only the revenues Colorado-Ute receives from its Members and, since the revenue increase sought by Colorado-Ute was approved by the PUC, (Decision P.7), it is only the portion of Colorado-Ute's revenue received from each Member that is in dispute. It is the property of each of the Members that will be affected by this Court's decision.

Hearings were held before the PUC in October and November 1982, almost six years ago. The evidence relied upon in determining that a demand-energy rate structure was appropriate for Colorado-Ute is no longer valid.

A demand-energy rate structure will also have an adverse impact on matters which have occurred since the close of hearings before the PUC. In a March 1983 filing with the PUC, Colorado-Ute added an interruptible rate schedule. Since that time approximately half of the Members have elected to receive service under that interruptible rate schedule. Hundreds of retail customers are now served under retail interruptible rate schedules. A demand-energy rate structure will interfere with the availability of interruptible rates. The economy has changed in the Members' service territory, as well as their growth in electric loads. There is a surplus of generation in the Rocky Mountain Region. Other areas, which may be adversely impacted by a demand-energy rate structure for Colorado-Ute's Members are: purchases from small power producers and cogenerators; and transmission agreements with others.

If the PUC enters an order on the appropriate wholesale rate structure that will be used to bill the members based on evidence that is more that six years old and no longer valid and without consideration of intervening developments, the Members will have been denied their rights to due process under the Colorado Constitution and the U.S. Constitution.

3. The Court, in discussing the possibility of refunds, has erred, in that the only payments, affected by the PUC Orders in this matter, are the payments made by the Members to Colorado-Ute and any refunds would be an unlawful confiscation of the Members' property under the 5th Amendment, U.S. Constitution.

The PUC, in Decision No. C83-1176, dated July 26, 1983, at p.14, noted that the tariffs at issue "relate only to the

wholesale power rates charged by it [Colorado-Ute] to its members and not the rates charged by the fourteen member distribution cooperatives to their respective end-use customers." The rates charged to ARCO, Exxon, and Shell Western E&P, Inc. were not at issue in the PUC proceeding and any refund ordered to those customers from the Members, who provide retail electric service to those customers, would be an unlawful confiscation of the Members' property under the U.S. Constitution.

Furthermore, if Colorado-Ute were ordered to make refunds to any of its Members, based on a rate structure that was not in effect for the period covered by the refunds, (even though the rates charged by Colorado-Ute were lawful at the time), the financial condition of Colorado-Ute would be adversely affected. Colorado-Ute is a non-profit corporation, as noted at p.5 of the Court's decision, and the only wholesale electric rates, over which the PUC has any jurisdiction, are the rates Colorado-Ute charges its Members. If Colorado-Ute makes refunds and is thus revenue deficient, all of the Members of Colorado-Ute will pay higher future rates to cover that deficiency. Any refunds ordered to be made by Colorado-Ute will result in an unlawful confiscation of the Members' property under the U.S. Constitution.

4. The PUC Decisions, as affirmed by this Court, impair the Members' Contracts with Colorado-Ute in violation of Contract Clause, U.S. Const., Act I, Section 10, cl 1, and Colo Const. Act. II, Section 11.

The PUC decision, in these matters, affect the rates Colorado-Ute charges its Member Associations for wholesale electric service and only those rates. Colorado-Ute provides

that service in accordance with the terms of all requirement contracts with the members, which contracts extend through December 31, 2025.[2] Neither Colorado-Ute, the Members, nor the Rural Electrification Administration objected to or complained about the flat energy rate structure established pursuant to the all-requirements contract. The PUC Decisions, as affirmed by this Court, impair the Members' contracts with Colorado-Ute in violation of the Contract Clause of the U.S. Constitution and the Colorado Constitution (See: Refining Co. v. Public Utilities Commission, (1920), 68 Colo. 137, 187 p. 1082).

Conclusion

Wherefore the members respectfully request that the Supreme Court grant rehearing in these matters.

Respectfully submitted,

Delta-Montrose Electric Association
Grand Valley Rural Power Lines, Inc.
Gunnison County Electric Association, Inc.
Holy Cross Electric Association, Inc.
Intermountain Rural Electric Association
La Plata Electric Association, Inc.

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[2] (See "Brief of Intermountain Rural Electric Association In Support of Motion to Dismiss for Lack of Jurisdiction", filed Aug. 27, 1982).

San Isabel Electric Association, Inc.
San Luis Valley Rural Electric Cooperative, Inc.
San Miguel Power Association, Inc.
Sangre de Cristo Electric Association, Inc.
Southeast Colorado Power Association
White River Electric Association, Inc.
Yampa Valley Electric Association, Inc.

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No. 88-977

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In The

Supreme Court of the United States

October Term, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., et al.,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The questions presented by this Motion to Dismiss are:

1. Whether this court has jurisdiction to review federal questions that were not raised in the highest state court having jurisdiction to review the questions until the appellants filed their petitions for rehearing, which petitions were summarily denied; and

2. Whether the appellants have raised substantial federal questions that have not already been decided in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983).

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The appellee Public Utilities Commission of the State of Colorado ("CPUC") moves the court for an order dismissing the appeal herein or, in the alternative, for an order affirming the judgment of the Supreme Court of the State of Colorado on the grounds that one of the 2 questions on which the decision of the cause depends is so insubstantial as to need no further argument, and that as to both questions on which the decision of the cause depends the court does not have jurisdiction.

STATEMENT OF FACTS

The matter before the court had its origins on December 15, 1981 when appellant Colorado-Ute Electric Association, Inc. ("Colorado-Ute") filed with CPUC Advice Letter No. 45 and revised tariff Schedules A and B (App. 1-6). Revised Schedules A and B contained the terms under which Colorado-Ute would sell wholesale electric power to its 14 member cooperatives ("members").

Colorado-Ute generates electric power at coal-fired and hydro-electric powerplants located within the State of Colorado. Wholesale sales by Colorado-Ute to its members under revised Schedules A and B are made to each member either at a bulk delivery point (Schedule B) or at a load center delivery point (Schedule A). All bulk delivery points and load center delivery points are located within Colorado. Members of Colorado-Ute have been certificated by CPUC defined geographic service areas located wholely within the State of Colorado.

In Advice Letter No. 45, Colorado-Ute stated that the purpose of the filing was to increase Colorado-Ute's

gross revenues from its members by 12.157 percent (App. 2). The 12.157 percent increase became effective on Janurary 15, 1982.

On January 12, 1982, CPUC commenced Case No. 6076 to investigate the justness and reasonableness of Colorado-Ute's 12.157 percent increase and revised Schedules A and B. (Appellants' A-96). All 14 members of Colorado-Ute were granted permission to intervene, as was a number of other parties, including Exxon Company, U.S.A. ("Exxon"), Atlantic Richfield Company ("ARCO") and Shell Oil Company ("Shell"). (Appellants' A-98). Colorado-Ute made its first discovery request for the WASP-82 computer program (subject of appellants' Question No. 2) on October 7, one day after the trial in Case No. 6076 had commenced. Colorado-Ute had been made aware of the existence of the WASP-82 program by the CPUC staff at a meeting with Colorado-Ute on February 7, 1982, 7½ months before the hearing commenced (App. 7-10). CPUC's Rules of Practice and Procedure provide for discovery pursuant to the Colorado Rules of Civil Procedure. CPUC responded to Colorado-Ute's late discovery request by directing its staff to make a full exchange of information with Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature of the program (Appellants' A-144).

On July 26, 1983, CPUC entered Decision No. C83-1176 (Appellants' A-93). In this decision, CPUC approved the 12.157 percent increase contained in Advice Letter No. 45, but directed Colrado-Ute to re-implement a demand/energy rate structure for its wholesale sales to its members and to abandon the experimental unit pricing (flat energy rate) (Appellants' A-120, 121, 138). In

designing the demand/energy rates, CPUC allocated $24,084,126 in generation fixed costs to the energy component of the demand/energy rates (Appellants' A-119). Also in this decision, CPUC found that the WASP-82 evidence was irrelevant to the merits of Case No. 6076, since Case No. 6076 involved an investigation of the justness and reasonableness of the wholesale power rates charged by Colorado-Ute to its members, whereas the WASP-82 study concerned the benefits to be derived at the retail level by members utilizing demand/energy retail rates (Appellants' A-110).

Colorado-Ute and 13 of its 14 members filed for judicial review of CPUC Decision Nos. C83-1176, C83-1392 and C83-1561 pursuant to Colo. Rev. Stat. sec. 40-6-115 (1973) in the Montrose County District Court, Colorado, and ARCO and Exxon filed for judicial review in the Denver District Court, which case was transferred to the Montrose County District Court and consolidated for hearing with the case filed by Colorado-Ute and its members. Colorado-Ute's and its members' action was assigned Case No. 83 CV 218, and ARCO's and Exxon's action was assigned Case No. 84 CV 7.

In the district court, Colorado-Ute and its members argued in Case No. 83 CV 218; (1) that CPUC did not have jurisdiction under Colo. Rev. Stat. sec. 40-6-111(4) (1984), to investigate a tariff filed by a cooperative electric association, unless a member or customer of the cooperative, or an affected public utility filed a complaint (Appellants' A-74); (2) that CPUC could not reject a tariff filed by a cooperative electric association and direct the filing of a new tariff, unless CPUC first found that the existing tariff was unjust, unreasonable, discriminatory,

or preferential and further found that the new tariff was just, reasonable, non-discriminatory and non-preferential (Appellants' A-76); (3) that CPUC could not disregard the convenience and preference of Colorado-Ute and its members in designing Colorado-Ute's wholesale power rates by substituting a different rate structure (Appellants' A-82); (4) that Colorado-Ute's rights to due process under the Fourteenth Amendment to the United States Constitution and Colo. Const. art. II, sec. 25 were violated by the admission of testimony based on the WASP-82 computer analysis and CPUC violated Colo. Rev. Stat. sec. 24-72-304 (1973) in refusing to provide Colorado-Ute with a copy of the WASP-82 computer program (Appellants' A-85); and (5) that the record in Case No. 6076 did not support the conclusion of CPUC that demand/energy rates were applicable to Colorado-Ute's system (Appellants' A-86).

In the district court in Case No. 84 CV 7, ARCO and Exxon argued (1) that CPUC's decision to allocate $24,084,126 in fixed costs to the energy component of the demand/energy rates was not supported by substantial evidence (Appellants' A-87); (2) that this allocation was arbitrary and capricious (Appellants' A-89); and (3) that CPUC failed to make adequate findings of fact to support this allocation (Appellants' A-90).

On May 7, 1986, the district court entered its order in both cases (Appellants' A-70). In case No. 83 CV 218, the district court accepted all of Colorado-Ute's arguments, except its argument that its constitutional rights had been violated by the introduction of testimony concerning the WASP-82 computer analysis (Appellants' A-85). The district court specifically ruled that CPUC did not violate

Colorado-Ute's rights to due process under the Fourteenth Amendment to the United States Constitution or under Colo. Const. art. II, sec. 25 (Appellants' A-85). In Case No. 84 CV 7, the district court accepted the arguments of ARCO and Exxon (Appellants' A-89, 90, 91).

Consistent with its rulings, the district court set aside CPUC's decisions in Case No. 6076 in both Case No. 83 CV 218 and 84 CV 7 (Appellants' A-86, 92).

CPUC appealed the district court's judgments in both cases to the Colorado Supreme Court (Case No. 86 SA 244). ARCO, Exxon and Shell appealed the district court's judgment in Case No. 83 CV 218 to the Colorado Supreme Court (Case No. 86 SA 246). Neither Colorado-Ute nor any of its members filed a Notice of Appeal or a Notice of Cross-Appeal in the Colorado Supreme Court challenging the district court's ruling that admission of testimony concerning the results of the WASP-82 computer analysis did not violate Colorado-Ute's due process rights under the Fourteenth Amendment to the United States Constitution or under Colo. Const. art. II, sec. 25. Also, in their briefs in the Colorado Supreme Court, Colorado-Ute and its members did not raise the WASP-82 issue or any supremacy clause, commerce clause or other federal constitutional issues.

On July 11, 1988, the Colorado Supreme Court issued its opinion (Appellants' A-1). In its opinion the court ruled 7-0 to reverse the district court's judgment in Case No. 83 CV 218, (Appellants' A-38), and ruled 4-3 to affirm the district court's judgment in Case No. 84 CV 7 (Appellants' A-47).

CPUC, Colorado-Ute, and 13 of its 14 members filed separate petitions for rehearing in the Colorado Supreme Court (Appellants' A-162, 175). In their petitions for rehearing, Colorado-Ute and its members raised for the first time in the Colorado Supreme Court commerce clause and supremacy clause issues and the issue that the admission of testimony concerning the WASP-82 analysis violated Colorado-Ute's due process rights (Appellants' A-166). On August 15, 1988, the Colorado Supreme Court issued its order denying all petitions for rehearing (Appellants' A-152).

ARGUMENT

I.

THE COURT DOES NOT HAVE JURISDICTION TO REVIEW THE WASP-82 QUESTION OR ANY COMMERCE CLAUSE OR SUPREMACY CLAUSE QUESTIONS.

It is necessary to the Court's jurisdiction under 28 U.S.C. sec. 1257 that a substantial federal question has been properly raised in the highest state court in which a decision could be had on that question.

As stated above, Colorado-Ute raised on judicial review in the state district court the issue that its due process rights under the Fourteenth Amendment to the United States Constitution and Colo. Const. art. II, sec. 25 had been violated by CPUC when CPUC permitted testimony concerning the results of the WASP-82 computer analysis. Neither Colorado-Ute nor its members raised any commerce clause or supremacy clause issues in the state district court.

Judicial Review of CPUC final decisions is specifically provided for in Colorado Statutes. *See* Colo. Rev. Stat. sec. 40-6-115 (1984) (App. 11). Section 40-6-115(2) specifically provides for challenging a final decision of CPUC "on the ground that it violates any right of a petitioner under the constitution of the United States . . . " (App. 11). For the reasons stated in its order, the district court ruled that the admission of testimony concerning the WASP-82 analysis did not violate Colorado-Ute's due process right under either the federal or state constitutions (Appellants' A-85).

Colo. Rev. Stat. sec. 40-6-115(5) (1984) provides, in part:

> Appellate reivew may be obtained in the supreme court concerning any final judgment of the district court on review, affirming, setting aside, or modifying any decision of the commission, in the same manner and with the same effect as appellate review of judgments of the district court in other civil action.

(App. 12). Pursuant to Colo. Rev. Stat. sec. 13-4-102(1)(c) (1973), the intermediate Colorado Court of Appeals does not have jurisdiction to review CPUC decisions.

As set forth above in the statement of facts, only CPUC, Exxon, ARCO and Shell appealed the district court's judgments to the Colorado Supreme Court. Under Colorado Appellate Rules, an appeal to the supreme court from a judgment of a state district court is perfected by filing a Notice of Appeal in the supreme court. *See* C.A.R. 3(a). *See also,* C.A.R. 3(a)(1), 3(b), (c) and (f) (App. 14-15). The Colorado Appellate Rules also provide for

cross appeals within 14 days after a timely Notice of Appeal has been filed. *See* C.A.R. 4(a). (App. 15-16).

Thus, it can be seen that procedures in Colorado courts provided ample opportunity for Colorado-Ute to present the WASP-82 issue to the Colorado Supreme Court, either by appeal, or by cross-appeal once CPUC, Exxon, ARCO and Shell had filed their appeals.

Neither the WASP-82 question, nor any commerce clause or supremacy clause questions were raised, briefed or argued by any party in the Colorado Supreme Court prior to the Court's opinion. Only after the Colorado Supreme Court had reversed the district court's judgment in Case No. 83 CV 218, did Colorado-Ute and its members raise the WASP-82 issue and other federal constitutional issues in their petitions for rehearing. (Appellants' A-162, 175). The Colorado Appellate Rules do not permit the filing of a response to a petition for rehearing, unless requested by the court and oral argument is not permitted. *See* C.A.R. 40(a). (App. 16). The federal constitutional issues, thus, were not briefed by CPUC, Exxon, ARCO, SWEPI, and only perfunctorily briefed by Colorado-Ute and its members in their petitions for rehearing. The Colorado Supreme Court did not separately rule on any specific issue raised by Colorado-Ute or its members in their petitions for rehearing. The Colorado Supreme Court simply denied all petitions for rehearing in a one sentence denial. (Appellants' A-153).

Raising a federal question for the first time in a petition for rehearing in the highest state court having jurisdiction to review the question is insufficient, unless the highest state court actually entertains the petition and

expressly decides the question. *Radio Station WOW v, Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denkla,* 357 U.S. 235, 243-244 (1958); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932). The Colorado Supreme Court's one sentence denial of all petitions for rehearing was insufficient under 28 U.S.C. sec. 1257 to constitute a reviewable judgment by the highest court of the state in which a decision could be had. *Consolidated Turnpike Co. v. Norfolk & O.V. Ry. Co.,* 228 U.S. 326, 333-334 (1913); *Forbes v. State Council,* 216 U.S. 396, 399 (1910); *McCorquodale v. Texas,* 211 U.S. 432, 436-437 (1908).

It is submitted that this court does not have jurisdiction to review the federal questions raised in the Jurisdictional Statement.

II.

THE CASE ALSO DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION OR A SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Colorado-Ute and its members in their jurisdictional statement attempt to portray this case as one involving the whoesale sale of electric power in interstate commerce. Colorado-Ute and its members also attempt to portray this case as one involving impairment by CPUC of loans made by the Rural Electrification Administration ("REA") to Colorado-Ute. Such is not the case.

This matter arose when Colorado-Ute filed an advice letter and two revised tariff schedules with CPUC notifying CPUC that Colorado-Ute would increase its wholesale rates to its member cooperatives by 12.157 percent.

The 12.157 percent increase went into effect on the date specified in the revised schedules. After an extensive hearing before CPUC, CPUC approved the 12.157 percent increase, but ordered Colorado-Ute to change its rate structure from an experimental unit pricing (flat energy rate) back to demand/energy. It is Colorado-Ute's objection to CPUC's direction to return to the more cost tracking demand/energy rate structure that has fueled Colorado-Ute's litigation in the courts of the State of Colorado, and now in this Court.

The tariff schedules filed by Colorado-Ute with CPUC applied *only* to its 14 member cooperatives. *All* delivery points at which electric power is metered and transferred from Colorado-Ute to its members are located within the State of Colorado. Colorado-Ute generates its electric power at coal-fired and hydro-electric powerplants located within Colorado. All of Colorado-Ute's members have been granted retail service territories by CPUC which are *wholely* within the State of Colorado.

In 1961, the Colorado legislature amended the Colorado "Public Utilities Law," Colo. Rev. Stat. Chapter 115, Articles 1-7 (1953), to declare cooperative electric associations to be affected with a public interest and to be public utilities subject to the jurisdiction, control and regulation of CPUC. *See* 1961 Colo. Sess. Laws, 627-628 amending section Colo. Rev. Stat. 115-1-3 (1963). The 1961 amendment to the Colorado "Public Utilities Law" was before the Colorado Supreme Court in *Western Colorado Power Co. v. Public Utilities Commission*, 159 Colo. 262, 411 P.2d 785 (1966), *appeal dismissed sub nom. Colorado-Ute Electric Association, Inc. v. Western Colorado Power Co.*, 385 U.S. 22

(1966), *reh'g denied*, 385 U.S. 984, a case involving a decision of CPUC authorizing Colorado-Ute to construct the Hayden powerplant. In the *Western Colorado Power* case, the second question considered by the Colorado Supreme Court was stated by the court as follows:

> Does Colo. Sess. Laws 1961, ch. 198, 115-1-3(2), which generally conferred jurisdiction over cooperatives in the Public Utilities Commission, violate the Constitution of Colorado or of the United States?

159 Colo. at 279. The Colorado Supreme Court answered the question in the negative. *Id.* The court also held that under the 1961 amendment Colorado-Ute was subject to the jurisdiction, control and regulation of CPUC. *Id.* at 280. Colorado-Ute appealed the Colorado Supreme Court's opinion to this court which dismissed the appeal for want of jurisdiction and denied certiorari. 385 U.S. at 22. CPUC has regulated Colorado-Ute's intrastate wholesale rates and service to its members since 1961 under the 1961 amendment (Appellants' A-100).

Thus, this is not a case where CPUC is attempting to assert jurisdiction for the first time over previously unregulated intrastate wholesale rates of a cooperative electric association, such as in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, Supra.* CPUC has been regulating Colorado-Ute's intrastate wholesale rates to its members for almost 28 years.

Other than the above distinction, CPUC submits that the *Arkansas Electric Cooperative Corp.* (AECC) case is "on all fours" with the instant case, and that this court's

opinion in the *AECC* case has already decided the commerce clause and supremacy clause questions that Colorado-Ute wishes to raise herein. In the *AECC* case, this court began its opinion by stating:

> This appeal requires us to decide whether the Arkansas Public Service Commission (PSC) acted contrary to the Commerce Clause or the Supremacy Clause of the Constitution when it asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member retail distributors, all of whom are located within the state.

461 U.S. at 377.

The crucial facts in the *AECC* case are virtually indistinguishable from those herein: a generation and transmission ("G & T") cooperative electric association generating and selling at wholesale electric power to distribution cooperatives which are members of the G & T cooperative, which generation and sales are wholely within a single state. It is of interest to note that CPUC's Decision No. C83-1176 was rendered only 2 months after the issuance by this court of its opinion in the *AECC* case. This court's opinion on the commerce clause and supremacy clause questions are equally applicable in this case.

CONCLUSION

Wherefore, for the reasons stated above, appellee Public Utilities Commission of the State of Colorado respectfully requests that the court enter its order in this case dismissing the within appeal, or, in the alternative, affirming the judgment entered by the Colorado Supreme Court.

FOR THE COLORADO
ATTORNEY GENERAL

JOHN MILTON HUTCHINS
First Assistant Attorney General
Appellate Section

Attorneys for Appellee

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Telephone: (303) 866-3549

APPENDIX

Colorado-Ute Electric Association, Inc.

P.O. Box 1149

Montrose, Colorado 81402

(FILED DEC 15, 1981)

Telephone (303) 249-4501 TWX 910-929-6924

December 15, 1981

Advice No. 45

The Public Utilities Commission
of the State of Colorado
500 State Services Building
1525 Sherman Street
Denver, Colorado 80203

The accompanying scheduled issued by Colorado-Ute Electric Association, Inc., are sent to you for filing in compliance with the requirements of the Public Utilities Law:

1. First Revised Schedule B (cancels original Schedule B) to the contracts of Colorado-Ute, dated as of September 14, 1981, for wholesale electric service to the following members of Colorado-Ute, respectively:

Delta-Montrose Electric Association
Empire Electric Association, Inc.
Grand Valley Rural Power Lines, Inc.
Gunnison County Electric Association, Inc.
Intermountain Rural Electric Association
La Plata Electric Association, Inc.
Sangre de Cristo Electric Association, Inc.
San Isabel Electric Association, Inc.
San Luis Valley Rural Electric Cooperative, Inc.
San Miguel Power Association, Inc.
Southeast Colorado Power Association

White River Electric Association, Inc.
Yampa Valley Electric Association, Inc.

2. First Revised Schedule A (cancels original Schedule A) to the contracts of Colorado-Ute, dated as of September 14, 1981, for wholesale electric service to the following members of Colorado-Ute:

Holy Cross Electric Association, Inc.

A sufficient number of copies for filing one with each contract involved is submitted.

The purpose of this filing is to increase Colorado-Ute's revenues from its fourteen all-requirements members by approximately $11,120,603 or approximately 12.157%, based on sales during the twelve-month period ending October 31, 1981. Attached hereto are financial data supporting the proposed rate adjustment.

In Decision No. C78-1687, entered on December 21, 1978, in Investigation and Suspension Docket No. 1246, the Commission said:

> "In this docket, Colorado-Ute is acceding to the principles set forth by the Commission in its two prior rate cases and is utilizing a times interest earned ratio (TIER) of 1.92. The Commission states and finds that a TIER of 1.92 for Colorado-Ute continues to be fair and reasonable and will allow Colorado-Ute to maintain its financial integrity and to continue to attract capital on reasonable terms."

This TIER concept was again applied by the Commission in Investigation and Suspension Docket No. 1474, the Recommended Decision of the Examiner (No. R81-21) issued on January 9, 1981, which later became the decision of the Commission, providing, in part, as follows:

> "This Commission has historically determined Respondent's revenue requirements on the basis of

> the so-called TIER, and acronym for 'times-interest-earned ratio.' This approach is used because Respondent is financed almost entirely by long-term debt from various sources and will presumably continue to finance new construction and capital improvements by such method. Respondent's TIER is derived by dividing Respondent's net operating margins plus new interest (not including interest capitalized as AFUDC because it is included in the amount borrowed for a project) divided by such net interest. Over the last few years, the Commission has proceeded on the basis the Respondent should, when necessary, be authorized rates which resulted in a TIER of 1.92 on a fully adjusted test year basis."

The financial information attached hereto, supporting this rate adjustment of Colorado-Ute, is based on a TIER of 1.92, as found appropriate in the Commission decision. Utilizing said 1.92 TIER and applying the ratemaking principles set forth in prior Commission decisions, a revenue deficiency exists in the approximate amount of $35,220,883.

In order to minimize the financial impact on its member associations, Colorado-Ute has elected, by the present filing, to place in effect an increase in the amount of $11,120,603, rather than in the amount of the total revenue deficiency of $35,220,883.

This lesser increase is justified in that the Colorado-Ute financial forecast, based upon assumed inflation rates of 9%-7%-5% for the periods '81 thru '85, '86 thru '90, '91 thru '95, respectively, projects that over the total study period, net power costs will increase at an average annual compound rate of 7.1%. The effect of filing for a lower increase will be to levelize rate increases over the study period–thereby minimizing the financial impact on

the members of Colorado-Ute and the ultimate consumers served by such members. The percentage increases provided by the instant filing is approximately the same as the rate of inflation during the test year period.

The rate increase is intended to cover increases in costs over and above the costs included in the present rates, as follows:

Cents Per Kwh

	Present Rates	New Rates	Increase	Increase %
Interest Expense	1.006	1.234	.228	22.774
Fuel Costs	.724	.796	.072	9.889
Other Costs & Margins	1.792	1.920	.128	7.116
	3.522	3.950	.428	12.157

Annual Revenues

	Present Rates	New Rates	Increases	Increase %
Interest Expense	$26,119,429	$ 32,067,742	5,948,313	22.774
Fuel Costs	18,812,959	20,673,410	1,860,451	9.889
Other Costs & Margins	46,542,007	3,311,839	49,853,846	7.116
	91,474,395	102,594,998	11,120,603	12.157

A further reason for the filing of this rate increase in a lesser amount is the applicability of House Bill 1444, enacted into law by the last session of the Colorado Legislature. Under the provisions of this law, this rate filing becomes effective on thirty (30) days notice–thereby eliminating any regulatory lag in obtaining necessary rate relief. The applicability of this law reduces the need for

major percentage rate increases, and is of great help to Colorado-Ute in pursuing its Board policy to levelize the amount of rate increases, thereby minimizing the financial impact on its member associations.

Also attached hereto is a copy of the notice which has been mailed to the members of Colorado-Ute on the date of this letter in compliance with Rule 18 of the Commission's Rules of Practice and Procedures, and an affidavit of mailing.

This filing shall become effective on thirty (30) days statutory notice on January 15, 1982

Very truly yours,

/s/ Girts Krumins
President

GK-HSB:cml

Attachments as stated

Colorado-Ute Electric Association, Inc.

First Revised Schedule A
Cancels Original Schedule "A"

Availability

Available to all cooperative associations which are, or shall be, members of the seller. Electric power and energy furnished hereunder shall be separately metered and billed for each bulk delivery point. Service under this schedule shall constitute delivery of electrical power and energy at 44 kv or 69 kv, except as otherwise agreed upon.

Monthly Rate

Energy charge	$.03889 per kwh "I"
"I" signifies increase in rate	Advice Letter No. 45 Filing Date: 12/15/81 Effective Date: 1/15/82
Colorado-Ute Electric Association, Inc.	First Revised Schedule A Cancels Original Schedule "A"

Availability

Available to all cooperative associations which are, or shall be, members of the seller. Electric power and energy furnished hereunder shall be separately metered and billed for each load center delivery point. Service under this schedule shall constitute delivery of electrical power and energy at 7.2/12.5 kv or 14.4/24.9 kv, except as otherwise agreed upon.

Monthly Rate

Energy charge	.04378 per kwh "I"
"I" signifies increase in rate	Advice Letter No. 45 Filing Date: 12/15/81 Effective Date: 1/15/82

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF THE INVESTIGATION OF THE SCHEDULES ACCOMPANYING ADVICE LETTER NO. 45 FILED BY COLORADO-UTE ELECTRIC ASSOCIATION INC.	)))))	Case No. 6076 Volume IV

Denver, Colorado

October 25, 1982

Met pursuant to notice.

BEFORE: Commissioners Edythe S. Miller
Daniel E. Muse
Clarence Raymond Clark III

APPEARANCES:

(As previously noted.)

* * *

(p. 43) called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SCHIRO:

Q Would you please state your name and business address.

A My name is Warren L. Wendling; it is W-e-n-d-l-i-n-g. My business address is Room 520, State Services Building, 1525 Sherman Street, Denver.

Q By whom are you employed and in what capacity?

A I am employed by the Public Utilities Commission as an Engineering Analyst.

Q Have you prepared testimony and exhibits that were prefiled in this proceeding?

A Yes, I have.

Q Did your testimony and exhibits utilize the WASP-82 computer program?

A Yes, it did.

Q Can you briefly tell us for what purpose the WASP-82 program was used?

A The WASP-82 program was used to examine the potential benefits which would result from the use of a demand/energy rate on the retail level for all new all-electric customers of Colorado-Ute Electric Association. This was done by looking at the cost of production and capital (p. 44) expansion over a 20-year period. This was done by comparing two optimal generation expansion plans.

Q Mr. Wendling, did you attend a meeting on or about February 26, 1982 at the Commission with members of the Staff and Colorado-Ute employees?

A Yes, I did.

Q Could you name the people who were in attendance?

A In attendance at that meeting for the Staff was Dr. George Parkins, myself, and a consultant from the firm of Entek. Mr. Bob Bryant – in attendance at that meeting for Colorado-Ute was Mr. Bob Bryant, Mr. Raymond Keith and Mr. Larry Day.

Q At that meeting did your discuss the WASP-82 program?

A Yes. The purpose of that meeting was to explain to Colorado-Ute the data request that we were making upon them to receive the data that would be necessary to execute the WASP program. At that time we went to some detail to explain and describe the operation of the WASP-82 program and what we were going to do.

Q Mr. Wendling, I have just handed you what has been marked as Exhibit 44. Can you identify that for the record, please?

A Yes. Exhibit 44 is entitled a Simplified WASP-II Flow Chart. This is a diagram of the WASP-II program (p. 45) that was the basis for the WASP-82 program, and which we discussed at that February 26th meeting.

Q Did you explain each one of the modules in this program to Colorado-Ute?

A Yes, we did.

Q Did you also explain to Colorado-Ute at the February 26, 1982 meeting that the WASP-82 program would be used in the Staff's testimony and exhibits in the pending rate case?

A Yes, Dr. Parkins made that known to Mr. Bryant.

Q Did you provide Colorado-Ute with a copy of Exhibit 4 at the February meeting?

A Yes, we did.

MS. SCHIRO: I would like to move for the admission into evidence of Exhibit 44.

CHAIRWOMAN MILLER: Any objection to the admission of Exhibit 44?

MS. SCHIRO: I might note it is being offered for a limited purpose only, and that is for the purpose of the hearing on this motion for protective orders.

MR. BJELLAND: On that basis, no objection.

CHAIRWOMAN MILLER: Exhibit 44 is admitted.

Q (By Ms. Schiro) Mr. Wendling, since the February 1982 meeting have you personally received any inquiries from Colorado-Ute concerning the WASP-82 program?

* * *

40-6-115. Review by district court - mandamus. (1) Within thirty days after the application for a rehearing, reargument, or reconsideration is denied by the commission, the applicant may apply to the district court for a writ of certiorari or review for the purpose of having the lawfulness of the final decision inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of issuance and shall direct the commission to certify its record in the proceeding to the court. On the return day, the cause shall be heard by the district court, unless, for a good reason shown, the same be continued. No new or additional evidence may be introduced in the district court, but the cause shall be heard on the record of the commission as certified by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings.

(2) The findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review, except that, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of a petitioner under the constitution of the United States or the constitution of the state of Colorado, the district court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final.

(3) Upon review, the district court shall enter judgment either affirming, setting aside, or modifying the decision of the commission. So far as necessary to the decision and where presented, the district court shall

decide all relevant questions of law and interpret all relevant constitutional and statutory provisions. The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the decision under review violates any right of the petitioner under the constitution of the United States or of the state of Colorado, and whether the decision of the commission is just and reasonable and whether its conclusions are in accordance with the evidence.

(4) The provisions of the Colorado rules of civil procedure relating to writs of certiorari or review, so far as applicable and not in conflict with the provisions of articles 1 to 13 of this title, shall apply to proceedings had in the district court under the provisions of this section. No court of this state, except the district court to the extent specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties; but an action in the nature of mandamus shall lie from the district court to the commission in all proper cases.

(5) All actions for review shall be commenced and tried in the district court in and for the county in which the petitioner resides, or if a corporation or partnership in the county in which it maintains its principal office or place of business, or in the district court of the city and county of Denver, at the option of the petitioner. Appellate review may be obtained in the supreme court concerning any final judgment of the district court on review, affirming, setting aside, or modifying any decision of the

commission, in the same manner and with the same effect as appellate review of judgments of the district court in other civil actions.

CHAPTER 32

COLORADO APPELLATE RULES

Rule 1. Scope of Rules

(a) Matters Reviewable. An appeal to the appellate court may be taken from:

(1) A final judgment of any district, superior, probate, or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes;

* * *

Rule 3. Appeal as of Right - How Taken

(a) Filing the Notice of Appeal in Appeals from Trial Courts. An appeal permitted by law from a trial court to the appellate court shall be taken by filing a notice of appeal with the clerk of the appellate court within the time allowed by C.A.R. 4. Upon the filing of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal and all procedures concerning the appeal unless otherwise specified by these rules. An advisory copy of the notice of appeal shall be served on the clerk of the trial court within the time for its filing in the appellate court. Failure of an appellant to take any step other than the timely filing of a notice of appeal in the appellate court does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. Content of the notice of appeal shall not be deemed jurisdictional.

Comment: This change requires the direct filing of the notice of appeal with the appellate court.

(b) Filing the Notice of Appeal or Petition for Review in Appeals from State Agencies. An appeal permitted by statute from a state agency directly to the Court of Appeals or appellate review from a district court shall be in the manner and within the time prescribed by the particular statute.

(c) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

* * *

Rule 4. Appeal as of Right - When Taken

(a) Appeals in Civil Cases (Other than Appeals or Appellate Review Within C.A.R. 3.1). In a civil case in which an appeal is permitted by law as of right from a trial court to the appellate court the notice of appeal required by C.A.R. 3 shall be filed with the appellate court with an advisory copy served on the clerk of the trial court within forty-five days of the date of the entry of the judgment or order appealed from if the parties are present at the time such judgment is announced. In appeals from district court review of agency actions, such notice of appeal shall be in addition to the statutory thirty-days notice of intent to seek appellate review filed with the district court required by 24-4-106 (9). If notice

of the entry of judgment is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the notice. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (a), whichever period last expires.

* * *

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

* * *

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-977

In The

Supreme Court of the United States

October Term, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., ET AL.,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, ET AL.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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Shell Western E&P Inc.

February 10, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The questions presented by this motion to dismiss or affirm are:

1. Whether review of federal questions can be had under 28 U.S.C. § 1257(2) or (3) when such questions were raised for the first time below in a petition for rehearing after the highest court of a state had entered its decision in the cause, and where that court, which strictly and regularly follows a policy of not entertaining such questions on a petition for rehearing, refused to decide the questions.

2. Whether the appeal raises substantial federal questions that would warrant either a reexamination of matters already decided in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), or an enquiry into whether procedural due process of law was violated in the administrative hearing below when a proprietary computer program was not provided for use in connection with cross-examination after the party making the request conceded that it had sufficient information from other sources to proceed with the hearing.

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The appellee Shell Western E&P Inc. (SWEPI)[1] moves this Court for an order dismissing the appeal from the judgment of the Colorado Supreme Court on the grounds that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on and that the judgment below rests on an adequate non-federal basis or, in the alternative, for an order affirming the judgment on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellant Colorado-Ute Electric Association (Colorado-Ute) is a rural power cooperative that generates and sells electric power and energy at wholesale to fourteen member distribution cooperatives within the State of Colorado. All of Colorado-Ute's generating facilities are located within the State of Colorado. All of the electricity that Colorado-Ute supplies to its fourteen members is sold at transmission or load center delivery points located within the State of Colorado. Colorado-Ute does make off-system sales of surplus power to customers in other states, but the bulk of the power it generates is supplied to its fourteen Colorado members under long-term "all requirements" contracts. The wholesale rates under which Colorado-Ute markets power and energy to

[1] SWEPI is a Delaware corporation. Pursuant to Sup. Ct. R. 28.1, a list of its corporate parents, subsidiaries, and affiliates is set forth on sheet A-1 of the appendix to this brief.

its members in Colorado have been regulated by the Colorado Public Utilities Commission (PUC) since 1961.

In December 1981, Colorado-Ute filed rate schedules with the PUC designed to increase its revenues approximately 12 per cent. Following extensive hearings, the PUC issued its decision in July 1983, approving the rate increase but ordering Colorado-Ute to adopt a demand-energy rate structure to recover the authorized revenue requirement. The rate structure then being used by Colorado-Ute was a simple flat rate by means of which energy is sold at a uniform charge per kilowatt hour regardless of the magnitude or other characteristics of the electric loads being served. The PUC found that this pricing scheme was unjust, unreasonable, discriminatory, preferential, and unlawful – principally because it was not cost tracking. PUC Decis. No. C83-1176, dated July 26, 1983, *aff'd on reh'g*, PUC Decis. No. C83-1392, dated September 7, 1983. (Appellants' App. A-93, A-139)

One of Colorado-Ute's members, an intervenor and one of the Appellants herein, moved to dismiss the proceeding on the ground that the PUC's assertion of jurisdiction over Colorado-Ute's wholesale rates to its Colorado members was not constitutionally permissible in light of the Commerce Clause of Article I, Section 8 of the United States Constitution. The PUC denied this motion on the basis of this Court's decision in the *Arkansas Electric* case (*Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983)), having found that the factual situation in the two cases was virtually identical. (Appellants' App. A-99-101)

During the PUC hearing, the PUC's Staff presented testimony that was based in part on results of studies generated by a proprietary computer program known as "WASP-82". Colorado-Ute demanded that it have the computer program to analyze for possible use in cross-examination. Instead, because of the proprietary nature of WASP-82, the PUC directed its Staff to make a full disclosure of pertinent information to enable Colorado-Ute to understand how the program worked. This was done. Later, on the record, Colorado-Ute's employee to whom the data was provided confirmed that this arrangement would in fact supply the information that Colorado-Ute needed in order to proceed with the hearing. (Appellants' App. A-144-45)

Colorado-Ute and its members sought review of the PUC's decisions in the state district court pursuant to § 40-6-115, 17 C.R.S. (1984 Repl. Vol.). (PUC App. 11-13) The PUC's decision was challenged on a variety of grounds – the principal contention being that the PUC had no authority to interfere with Colorado-Ute's choice of a rate design. They also asserted that the PUC's refusal to surrender the WASP-82 computer program resulted in a denial of procedural due process of law. They did not, however, press in the district court the burden on interstate commerce and preemption claims that the PUC had rejected.

The district court held that the PUC had exceeded its jurisdiction by prescribing a change in Colorado-Ute's rate structure, and judgment was accordingly entered reversing the PUC's decisions. Judgment was also entered, however, providing that if the PUC's authority to change Colorado-Ute's rate structure was upheld on further appeal, the PUC would be required to adopt a

modified schedule of demand-energy rates to correct what the court found had been a misallocation of costs from the demand to the energy component of the rates. (Appellants' App. A-70-92) Colorado-Ute's WASP-82 due process claim was expressly rejected by the district court. (Appellants' App. A-85)

The PUC and SWEPI, along with two other intervenors, Atlantic Richfield Company and Exxon Company USA, appealed to the Colorado Supreme Court that part of the District Court's judgment which had set aside the PUC's decisions. The PUC also appealed that part of the judgment which would require it to modify the demand-energy rates to correct the misallocation of costs. Neither Colorado-Ute nor any of its members filed a notice of appeal or a cross-appeal from the ruling of the district court rejecting their WASP-82 denial of due process claim. Neither this issue nor any of the Commerce Clause or federal preemption questions they had unsuccessfully raised before the PUC was mentioned in their briefs on the merits in the Colorado Supreme Court.

On July 11, 1988, the Colorado Supreme Court issued its opinion reversing that part of the district court's judgment which had set aside the PUC's decisions but affirming that part of the judgment which required the PUC to correct the cost misallocation. (Appellants' App. A-1-A-56) Colorado-Ute and thirteen of its members petitioned for rehearing. (Appellants' App. A-162, A-175) In these petitions they attempted to raise for the first time, in the Colorado Supreme Court, the federal questions now sought to be reviewed in this Court, namely their burden on interstate commerce, preemption, and denial of procedural due process of law claims. The Colorado

Supreme Court did not expressly decide these questions. On August 15, 1988, it denied the petitions for rehearing, without discussion. (Appellants' App. A-153)

ARGUMENT

I.

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED NOR EXPRESSLY PASSED ON IN THE COLORADO SUPREME COURT AND THE JUDGMENT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

In cases such as this involving an appeal from a judgment of the highest court of a State under 28 U.S.C. § 1257(2), as well as on an application under subsection (3) of that statute for a writ of certiorari to review such a judgment, it appears to be the settled rule that there will be no review of federal questions "not pressed or passed upon below," and that this is so regardless of whether the rule is constructed to apply on a strict "jurisdictional" or only a "prudential" basis. *Illinois v. Gates*, 462 U.S. 213, 222 (1983); *Bankers Life and Casualty Company v. Crenshaw*, 108 S.Ct. 1645, 1649-51 (1988). The jurisdictional requirement of 28 U.S.C. § 1257 that the validity of a state statute was "drawn in question" on the ground of its repugnancy to the Constitution, treaties or laws of the United States, makes it essential that " 'the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.' " *Street v. New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

The Appellants have acknowledged that none of the federal questions now sought to be reviewed was raised until after the Colorado Supreme Court issued its opinion and entered judgment adverse to them, and that these questions were then presented for the first time in their petitions for rehearing. There is no provision in the Colorado Appellate Rules for raising new matters on a petition for rehearing. The Colorado Supreme Court disposed of the petitions for rehearing with a one-sentence statement that they were denied, without any discussion of the issues. (Appellants' App. A-153) This belated attempt of the Appellants to raise federal questions in the Colorado Supreme Court came too late to satisfy the "pressed or passed upon below" rule cited in *Illinois v. Gates, supra*. The Colorado Supreme Court did not expressly decide these questions. The state court's refusal to grant a rehearing to decide them is supported by independent and adequate state law grounds which should bar review in this Court. Where as here the decision of the state court does not discuss such questions, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corporation v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974)).

The Colorado appellate courts have consistently refused to consider questions not properly raised by either a notice of appeal or a cross-appeal. *See, e.g., Haney v. Public Utilities Commission*, 194 Colo. 481, 574 P.2d 863 (1978):

> Finally, the appellees contend that they were denied due process because certain statutory procedures

> were not followed. However, since the appellees did not file a notice of cross-appeal to raise this challenge to the trial court's decision, the issue is not properly before us on appeal. C.A.R. 4(a); . . . .

Haney, supra, 574 P.2d at 865; *accord, Rocky Mountain Sales & Service, Inc. v. Havana RV, Inc.*, 635 P.2d 935, 937 (Colo. App. 1981); *cf. Best v. La Plata Planning Commission*, 701 P.2d 91 (Colo. App. 1984) (but the question of jurisdiction may be raised at any stage of an action). The exception to this rule is that an appellee, " 'may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' " *Blocker Exploration Company v. Frontier Exploration, Inc.*, 740 P.2d 983, 989 (Colo. 1987) (quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)).

But Colorado-Ute and the fourteen members followed none of the available courses to press before the Colorado Supreme Court the federal questions they now seek to raise before this Court. They admittedly filed no appeal or cross-appeal from the adverse ruling of the trial court on their WASP-82 denial of procedural due process claim. Neither did they make any attempt in the Colorado Supreme Court to uphold the favorable part of the trial court's judgment, which had set aside the PUC's decision on other grounds, by advancing any of their federal constitutional theories as additional grounds for affirming the judgment they were defending. The suggestion contained in Appellants' Jurisdictional Statement that they had "no basis to assert these claims" on appeal before the Colorado Supreme Court is clearly not correct.

The applicable rules gave them three opportunities to do so.[2] If they believed the claims had merit, they had both reason and opportunity to assert them in timely fashion. Unveiling these claims for the first time in a petition for rehearing after the appeal was decided was not sufficient.

The long-standing rule in Colorado is that an appellate court will not consider a question raised for the first time on a petition for rehearing, even a question of constitutional significance. *E.g., Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 39 Colo. 332, 90 P. 1023, 1027 (1907); *Isham v. Miller*, 80 Colo. 380, 252 P. 353, 354 (1927); *Taussig v. Moffat Tunnel Water & Development Co.*, 106 Colo. 384, 106 P.2d 363, 368 (1940). There are three recognized exceptions: (1) where the appellate court decides the case in the first instance on a basis not raised by the record or argued by counsel, *see Model Land & Irrigation Co. v. Baca Irrigating Ditch Co.*, 83 Colo. 131, 262 P. 517, 519 (1927); (2) if this was the "earliest possible time" that a constitutional question could be raised, *see Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064, 1074 (1959); and (3) if a "jurisdictional" question is raised, *see Central Locomotive & Car Works v. Smith*, 27 Colo. App. 449, 150 P. 241 (1915). It is clear that none of these exceptions applies in the present case. Nor is

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[2] First, by filing a notice of appeal on the due process issue within 45 days of the entry of judgment in the trial court or, next, by filing a cross-appeal on that issue within 14 days after the first appeal was filed by others (C.A.R. 4(a), PUC App. 15-16), or, later, by arguing any or all of their federal constitutional claims in their brief on the merits before the Colorado Supreme Court, *Blocker Exploration Co. v. Frontier Exploration, Inc., supra.*

there anything else that can excuse the Appellants' failure to bring their purported constitutional questions to the attention of the Colorado Supreme Court in due time and in the manner required to obtain a meaningful decision which could then furnish the basis for any further appeal to this Court. The applicable rule of decision in Colorado, which precluded consideration of these questions at the untimely juncture when they were first presented, and which has been "strictly [and] regularly followed" by the Colorado courts, *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), constitutes an independent and adequate state ground barring review of the federal questions in this Court. *See Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n. 4 (1964). The appeal should, therefore, be dismissed.

II.

THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Appellants contend that this case presents important questions concerning the extent to which state regulatory commissions may, consistent with the Commerce Clause and the latent preemptive power of the United States Rural Electrification Administration (REA), regulate the wholesale power rates charged by a rural electric cooperative association such as Colorado-Ute. The Appellants necessarily concede at the outset that this Court's decision scarcely more than five years ago in *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), sets forth the present "state of

the law." Their arguments are therefore shaped to make it appear that since the *Arkansas Electric* decision the REA has adopted a "more proactive" policy of its own toward controlling the rates of electric cooperatives, thereby presumably signaling the exercise of the potential preemptive authority which had been recognized in *Arkansas Electric*. *Id.* at 388-89. They go on to argue that "the level of state regulation" of Colorado-Ute in the present case has in fact resulted in the disruptive effect that *Arkansas Electric* envisioned might so seriously compromise important federal interests, including the ability of the cooperative to repay its loans, as to be implicitly preempted under federal law. Appellants' Brief 12-14. The Appellants thus hypothesize a "federal-state conflict," which they then go on to say this Court should take the opportunity to "untangle." *Id.* at 13-14.

This carefully landscaped argument rests on a slippery slope. The federal-state conflict that the Appellants have portrayed, and which they then infer they are caught in the middle of, simply does not exist. Nothing has in fact changed since *Arkansas Electric* which would warrant revisiting any of the questions settled there. In support of their "more proactive" characterization of REA's position, the Appellants quote from two recent letters from REA to other cooperatives, on the basis of which they contend that REA has asserted conflicting regulatory authority vis-a-vis state regulatory commissions. The apparently intended implication of this is that the action of the PUC in the present case creates the same sort of federal-state conflict depicted in these two letters.

Regardless of whether so intended or not, the impression that has been created is a totally false one.

Included in the appendix to the present brief are two letters from the REA to Colorado-Ute which directly refute the existence of any federal-state conflict in the present case. Both letters were written by the REA in response to letters from Colorado-Ute entreating REA to intercede on Colorado-Ute's behalf, before the PUC and the courts (including this Court), to abrogate the demand-energy rate structure that had been prescribed by the PUC and affirmed by the Colorado Supreme Court and allow Colorado-Ute to continue using the unlawful flat energy rate. The first of these letters, dated August 12, 1988, after referring to the jurisdiction of state commissions over wholesale rates under *Arkansas Electric*, and reaffirming REA's policy that it will "not interfere with state regulatory authority decisions unless REA's loan security is endangered," continues:

> Our main responsibility is that any rate structure approved by a state commission is equitable to members of a power supply borrower and sufficient to enable the borrower to repay all indebtedness and provide a reasonable margin. While REA found that Colorado-Ute's energy rate met this criteria, Colorado-Ute and its members should recognize that demand-energy rates, which are used almost universally by REA power supply borrowers and investor-owned utilities, also satisfy this criteria. Unless REA receives evidence which clearly indicates that the Government's loan security, either to Colorado-Ute or its member systems, is endangered, REA does not

intend to take a position which is contrary to the Commission.[3]

Subsequently, on November 14, 1988, REA rejected Colorado-Ute's request that REA reconsider its position and intercede to prevent the implementation of the demand-energy rate structure that Colorado-Ute had been ordered to implement. This second letter stated in unambiguous terms: "REA believes that there is no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate." (Appendix A-3)

These letters from the REA to Colorado-Ute, which were presumably in Colorado-Ute's hands when this appeal was docketed, shatter the illusion of any federal-state conflict in the present case. Contrary to the Appellants' portrayal of the case, these letters make it clear that there is no real basis for attempting to advance this case as an appropriate vehicle for reconsidering, refining, or elaborating upon *Arkansas Electric*. Appellants' arguments that the rate order of the PUC in the present case unconstitutionally burdens interstate commerce, and that the authority of the PUC to make that order has been expressly or implicitly preempted, are therefore so unsubstantial as to warrant no further argument.

The second branch of the appeal, which is based on the refusal of the PUC to deliver a proprietary computer program to Colorado-Ute during the administrative hearings, and which the Appellants contend operated to deny

---

[3] Appendix hereto, A-2.

them procedural due process of law, rests on an equally unsubstantial footing. Once again the theoretical arguments advanced simply do not fit what actually happened in the case. The PUC's findings on this issue are especially instructive.

> In fact, as Colorado-Ute knows, the record clearly establishes that the Commission went out of its way to accommodate Colorado-Ute's concerns in this regard by encouraging a full exchange of information between the Staff and Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature thereof . . . . The bottom line is that Colorado-Ute employee Raymond Keith, on the record, was explicitly asked by the Chairwoman of the Commission "Is that (referring to the information to be supplied by the Staff of the Commission to Colorado-Ute) going to give you sufficient time to analyze and to do what needs to be done?" Mr. Keith replied: "I believe it will. The only thing I can think of would be some clarification on the part of the print-outs that can be handled by either direct conversation or by telephone, but I don't think I'll need any additional paper prepared."
>
> Colorado-Ute cannot have it both ways. It agreed, on the record, that the information that would be given to it by the Staff would enable it to have sufficient time to analyze and to do what needed to be done. It cannot now claim that it was disadvantaged notwithstanding its counsel's pro forma objection on the record. (See October 26, 1982 transcript, p. 61).

PUC Decision No. C83-1392, dated September 7, 1983. (Appellants' App. A-144-45) On review of this ruling the district court concluded that the record clearly substantiates the ruling of the PUC. Order of the District Court, May 7, 1986. (Appellants' App. A-85)

This adverse ruling by the district court was not appealed or otherwise challenged before the Colorado Supreme Court. Even if this plain jurisdictional impediment did not exist, the due process issue is too chimerical to consider.

CONCLUSION

WHEREFORE, for the reasons stated, appellee Shell Western E&P Inc. respectfully requests the Court to dismiss the appeal, or, in the alternative, to affirm without further argument the judgment of the Colorado Supreme Court.

Respectfully submitted,

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Houston, Texas 77001

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Shell Western E&P Inc.

APPENDIX

List of Shell Western E&P Inc. Corporate Parents, Subsidiaries, and Affiliates

Parent Companies:

Royal Dutch Petroleum
Shell Transport and Trading Company, plc
Shell Petroleum Inc.
Shell Oil Company
Shell Energy Resources Inc.

Subsidiary Companies:

Belridge Farms
Belridge Packing Co.
Choctaw Pipe Line Company
Mabee Petroleum Corp.
SWEPI Royalties Inc.
Shell Cortez Pipeline Company
Shell Michigan Pipeline Company
Shell Western Pipelines Inc.

Affiliated Companies:

Cortez Capital Corporation
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Sideline Oil Company
Thums Long Beach Company
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation

United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

August 12, 1988

Mr. Girts Krumins, President
Colorado-Ute Electric
Association, Inc.
P.O. Box 1149
Montrose, Colorado 81402

RE: Colorado 46 Ute
Change in Rate Structure

This is in response to your letter dated July 25, 1988, to Mr. Jack Van Mark, advising REA of recent action by the Supreme Court of Colorado which basically affirms a 1983 Colorado Public Utilities Commission (Commission) order, requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate for its member systems and requesting REA to intercede with the Commission towards the end of permitting Colorado-Ute to retain its current uniform wholesale energy rate. We understand that Colorado-Ute and its members believe that any change in the present form of wholesale rate will adversely impact their operations.

The United States Supreme Court, in its decision of Arkansas Electric Cooperative Corp. v. Arkansas Public Utility Commission, 461 U.S. 375, May 16, 1983 took the position that a state may regulate the wholesale rate of an REA borrower where the member systems are all in that state. Historically, REA has taken the position that it does not interfere with state regulatory authority decisions unless REA's loan security is endangered.

Our main responsibility is that any rate structure approved by a state commission is equitable to members of a power supply borrower and sufficient to enable the borrower to repay all indebtedness and provide a reasonable margin. While REA found that Colorado-Ute's energy rate met this criteria, Colorado-Ute and its members should recognize that demand-energy rates, which are used almost universally by REA power supply borrowers and investor-owned utilities, also satisfy this criteria. Unless REA receives evidence which clearly indicates that the Government's loan security, either to Colorado-Ute or its member systems, is endangered, REA does not intend to take a position which is contrary to the Commission.

Since a number of your member systems have expressed interest in this matter, a copy of this letter is being sent to each of them for their information.

Sincerely,

/s/
MARTIN G. SEIPEL
Director
Southwest Area - Electric

United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

November 14, 1988

Mr. Roderick D. Myers
Chairman of the Board
Colorado-Ute Electric
Association, Inc.
P.O. Box 1149
Montrose, Colorado 81402

Dear Mr. Myers:

This is in response to Colorado-Ute's letter dated October 14, 1988, requesting that REA reconsider its earlier position and to intercede, in Colorado-Ute's behalf, before the Colorado Public Utilities Commission (Commission), the Federal District Court and the United States Supreme Court in order to allow Colorado-Ute to retain its current uniform wholesale energy rate and to prevent certain wholesale power refunds from being ordered by the Commission. As we have previously indicated, REA believes that there is no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate.

REA believes that it is premature to consider any action with respect to Colorado-Ute's potential liability resulting from refunds or damages since, at this time, there are no proceedings considering that specific issue. However, we are very interested in Colorado-Ute's financial viability and, at such time as refund proceedings may be initiated, REA would consider making our views known to the Commission.

With respect to the Commission's decision dated August 24, 1988, which is pending further judicial review, we believe that Colorado-Ute should, depending on the decision of the District Court, take immediate action to file with the Commission for increased revenues. We are aware that the rate level ordered by the Commission dates back to 1983, with two subsequent rate level changes placed into effect since that time. REA has been concerned for quite some time over the fact that Colorado-Ute has been experiencing significant operating losses since 1985. Because of these concerns, REA directed Colorado-Ute, in letters dated November 24, 1986, and December 18, 1986, not to place into effect the 5 percent rate reduction and to design rates to achieve operating results at a level sufficient to meet mortgage requirements. Considering Colorado-Ute's financial position, we believe that Colorado-Ute should file for an immediate rate increase, based on current test year data, sufficient to meet a TIER in excess of 1.0.

Please advise us as to what actions Colorado-Ute intends to take with respect to existing rate levels in light of continuing operating losses and keep us informed as to when hearings for refunds or damages are scheduled to commence.

Sincerely,

/s/
MARTIN G. SEIPEL
Director
Southwest Area - Electric

Supreme Court, U.S.
FILED
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On Appeal From The Supreme Court Of Colorado

MOTION TO DISMISS OR AFFIRM

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February 14, 1989

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28 pp

QUESTIONS PRESENTED

The questions presented by this Motion to Dismiss or Affirm are:

1. Whether Appellants have raised substantial federal questions under the Supremacy Clause or the Commerce Clause that have not already been decided by this Court in *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), given the virtual identity of the facts between the two cases and [illegible]n express statements by the Rural Electrification Administration declining the request that it intervene in opposition to the Colorado Public Utilities Commission order; and

2. Whether Appellants have raised a substantial federal question with respect to procedural due process about lack of access to computer codes when Appellants testified at the Commission hearing that sufficient information had been given them with regard to the computer analysis and Appellants chose, as a matter of trial strategy, to forego cross-examination on the issue; and

3. Whether this Court has jurisdiction over either question raised by Appellants when neither was presented to the Colorado Supreme Court until the filing of petitions for rehearing and the court did not grant rehearing.

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Appellee Empire Electric Association, Inc.[1] ("Empire Electric") moves the Court for an order affirming the judgment of the Colorado Supreme Court on the grounds that is it manifest that the questions on which decision of the cause depends are so unsubstantial as to need no further argument. Empire Electric further moves the Court for an order dismissing the appeal on the grounds that the Court lacks jurisdiction because the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on by the Colorado Supreme Court.

STATEMENT OF FACTS

Empire Electric is a rural electric cooperative and public utility engaged in the business of transmitting, distributing and selling electric power at retail to ultimate consumers. Empire Electric directly owns no electric generation facilities. With several other Colorado rural electric cooperatives, Empire Electric formed a generation

[1] Empire Electric Association, Inc. is a member of Appellant Colorado-Ute Electric Association, Inc. The other thirteen members of Colorado-Ute Electric Association, Inc. are Appellants Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre de Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; San Miguel Power Association, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; and Yampa Valley Electric Association, Inc. There are no other companies or entities with which Empire Electric is affiliated.

and transmission electric cooperative – Colorado-Ute Electric Association, Inc. ("Colorado-Ute") – to provide wholesale power to Empire Electric and the other member cooperatives. Today there are fourteen rural electric cooperatives that are members of the Colorado-Ute cooperative. Empire Electric purchases all its electric power at wholesale from Colorado-Ute under an "all requirements" contract and resells that power at retail to consumers in Empire Electric's certificated territories in Colorado and Utah. Empire Electric serves approximately 9,500 consumers in Colorado and approximately 1,000 consumers in Utah.

Empire Electric was aligned before the Colorado Supreme Court with Colorado-Ute and the other thirteen members of Colorado-Ute, all of which are Appellants in this Court. For the reasons set forth in this Motion, Empire Electric supports the Public Utilities Commission of the State of Colorado ("Colorado PUC" or "Commission") and other Appellees in the position that the appeal of Colorado-Ute *et al.* is groundless and should be dismissed by this Court.

This case concerns whether a state regulatory commission can constitutionally require Colorado-Ute to change its rate structure for wholesale power sold its member cooperatives from a uniform flat energy rate to a demand energy rate.[2] Empire Electric accepts the facts set

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[2] A uniform flat energy rate recovers all costs of generation and transmission through a uniform charge per kilowatt hour. A demand energy rate is a two-part rate which recovers fixed capital costs through demand charges based upon maximum kilowatt demand, and recovers variable operation and

(Continued on following page)

forth in the Statement of the Case in Appellants' Jurisdictional Statement. To these facts, however, must be added important factual developments that have occurred subsequent to the issuance of the Colorado Supreme Court decision that is the subject of this appeal.

After its defeat before the Colorado Supreme Court, Colorado-Ute, by letter, requested the United States Rural Electrification Administration ("REA") to intercede with the Colorado PUC to permit Colorado-Ute to retain its flat energy rate. By letter dated August 12, 1988, Martin G. Seipel, Director Southwest Area – Electric of the Rural Electrification Administration, turned down Colorado-Ute's request. In that correspondence, REA stated that it generally did not interfere with state commission regulatory decisions unless there were some evidence that REA's loan security would be endangered. The REA also informed Colorado-Ute that while it had no objection to Colorado-Ute's flat energy rate, the REA also had no objection to demand energy rates. The REA stated that demand energy rates are "used almost universally by REA power supply borrowers and investor-owned utilities." (App. 1-2).

Colorado-Ute again requested REA to step in and intercede before the Colorado PUC and before the United States Supreme Court with respect to the Commission-ordered demand energy rate structure. By letter dated

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(Continued from previous page)

maintenance expenses, including fuel costs, through energy charges based on kilowatt hour usage. See footnotes 1 and 3 to the Opinion of the Colorado Supreme Court (Appellants' A-48).

November 14, 1988 to Roderick D. Myers, Chairman of the Board of Colorado-Ute, Mr. Seipel reiterated that REA had no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate. (App. 4). These letters are set forth in full in the Appendix to this Motion to Dismiss or Affirm.

A flat energy rate had been approved for the first time by the Commission for Colorado-Ute's wholesale sales to its member cooperatives in February, 1981. Before that time, Colorado-Ute used a demand energy rate structure for its wholesale rates to its members. Several of the members of Colorado-Ute, including Empire Electric, use the demand energy rate structure in providing retail service to large electric customers. Utilities with which Colorado-Ute exchanges wholesale power also use demand energy rates.

ARGUMENT

I. THE CONSTITUTIONALITY OF STATE COMMISSION JURISDICTION OVER THE WHOLESALE RATES OF A GENERATION AND TRANSMISSION COOPERATIVE SUCH AS APPELLANT COLORADO-UTE HAS BEEN AFFIRMED BY THIS COURT. APPELLANTS' CHALLENGE IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

In *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), this Court upheld state commission jurisdiction over the wholesale

rates charged by a generation and transmission cooperative to its member retail rural electric cooperatives. In that case, the generation and transmission cooperative – Arkansas Electric Cooperative Corporation ("AECC") – was established with loan funds and technical assistance provided by the REA. AECC sold electric power at wholesale to its seventeen member rural electric cooperatives, which in turn resold the power to ultimate consumers. AECC sold most of what it generated to its member cooperatives, but AECC also engaged in interstate wholesale transactions over a multistate transmission grid with other electric utilities. AECC participated in a variety of sale and exchange agreements with other wholesale electric suppliers, buying and selling power as needed.

This Court ruled that the Arkansas Public Service Commission could constitutionally assert jurisdiction over the wholesale rates charged by AECC to its member cooperatives. State Commission jurisdiction was not preempted by either the Federal Power Act, 16 U.S.C. § 824(b), or the federal Rural Electrification Act, 7 U.S.C. § 901, *et seq.* Nor was state commission jurisdiction precluded by the Commerce Clause in Article I, § 8, cl. 3 of the United States Constitution. Applying the *Bruce Church* test,[3] this Court held that state regulation of wholesale rates charged by AECC to its members is well within the scope of legitimate local public interests because AECC's "basic operation consists of supplying power

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[3] In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Court formulated a test to determine when state regulation would be held unconstitutional under the Commerce Clause.

from generating facilities located within the State to member cooperatives, all of which are located within the State." *Id.* at 394. The fact that AECC purchased and sold wholesale power over the interstate grid was not considered sufficient to constitutionally preclude state regulation of wholesale transactions with member cooperatives within the state.

In this appeal, Colorado-Ute and thirteen of its member cooperatives argue that the Colorado Public Utilities Commission had no jurisdiction over the structure of the wholesale rates charged by Colorado-Ute to its member cooperatives. The factual predicate for Colorado PUC jurisdiction over Colorado-Ute's wholesale rates is virtually identical with the basis for Arkansas Public Service Commission jurisdiction over AECC. As set forth in Appellants' Jurisdictional Statement, Colorado-Ute is a rural electric cooperative association that generates, transmits and sells electric power at wholesale to its fourteen member rural electric cooperatives. Colorado-Ute obtains most of its bulk power from power plants in Colorado that it wholly or partially owns. It transmits and delivers the power in Colorado to its fourteen members. Colorado-Ute also engages in wholesale transactions over interstate grids with other utilities. Colorado-Ute has loans from REA; its facilities and operations are subject to restrictions contained in mortgages from REA.

Appellants agree that *Arkansas Electric* governs the issue of Colorado PUC jurisdiction over Colorado-Ute's wholesale rates. Appellants make no attempt to distinguish the Colorado-Ute business operations from those aspects of the AECC operations that are pertinent to the

issue of state utility commission jurisdiction. Instead, accepting this Court's analysis in *Arkansas Electric* as a given, Appellants argue that this case requires the Court to "refine" its analysis in *Arkansas Electric*. In essence, Appellants argue that the demand energy rate structure[4] ordered by the Colorado PUC has been directly or inferentially preempted by recent actions taken by REA with respect to two other cooperative utilities in two other states. Appellants call on the Court to declare that these REA actions preempt Colorado PUC jurisdiction that otherwise would be considered valid under the *Arkansas Electric* analysis.

This Court need not decide whether the REA actions taken with respect to Wabash Valley Power Association, Inc. in Indiana and Michigan or with respect to Big Rivers Electric Corporation in Kentucky would require a refinement of this Court's reasoning in *Arkansas Electric*. Those actions are not before the Court in this appeal. The issue in this appeal is whether REA intends to preempt the Colorado PUC's order that Colorado-Ute must employ a demand energy rate structure. It is clear that REA does *not* intend to assert any such preemption.

In the Appendix to this Motion are two letters from REA to Colorado-Ute that are dated subsequent to the order of the Colorado Supreme Court that is the subject of this appeal. These letters specifically state that REA

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[4] Appellants take no issue with the overall rate increase (i.e., the total authorized revenue) awarded Colorado-Ute by the Colorado PUC. Appellants' preemption arguments are directed solely to rate structure.

does not intend to take a position on demand energy rates contrary to that taken by the Colorado PUC. In the August 12, 1988 letter from Martin Seipel, Director, Southwest Area-Electric, Rural Electrification Administration to Girts Krumins, President, Colorado-Ute, Mr. Seipel acknowledges a request from Colorado-Ute that REA "intercede with the [Colorado Public Utilities] Commission toward the end of permitting Colorado-Ute to retain its current uniform wholesale energy rate." After stating that REA generally does not interfere with state regulatory authority decisions unless REA's loan security is endangered, Mr. Seipel informed Colorado-Ute as follows:

> Our main responsibility is that any rate structure approved by a state commission is equitable to members of a power supply borrower and sufficient to enable the borrower to repay all indebtedness and provide a reasonable margin. While REA found that Colorado-Ute's energy rate met this criteria, *Colorado-Ute and its members should recognize that demand-energy rates, which are used almost universally by REA power supply borrowers and investor-owned utilities, also satisfy this criteria.* [Emphasis supplied]

(App. 1-2).

Again, on November 14, 1988, Mr. Seipel, in a letter to Roderick D. Myers, Chairman of the Board of Colorado-Ute, emphatically stated:

> As we have previously indicated, REA believes that there is no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate.

(App. 4).

No further argument on direct or inferred REA preemption of the Colorado PUC demand energy rate order is required.

Appellants also argue that the PUC rate order creates a burden on interstate commerce, implying that application of the *Bruce Church* test in this case would find the Colorado PUC demand energy rate order constitutionally impermissible. The purported impacts on interstate commerce are detailed by Appellants in their footnote 11. This argument simply lacks merit.

As indicated above in the REA letters, demand energy rates are almost universally used by cooperative and investor-owned utilities, including the utilities with which Colorado-Ute exchanges power over interstate grids. No excessive burden on interstate commerce is created by a Colorado PUC order requiring Colorado-Ute to use this standard rate structure. Moreover, the wholesale rate structure at issue involves only the wholesale rates charged by Colorado-Ute to its members, all of which purchase power in Colorado and resell the power primarily in Colorado.[5] This fact situation is virtually identical with the fact pattern in *Arkansas Electric* that led this Court to the conclusion that there was no excessive burden placed on interstate commerce by state regulation of the wholesale rate. Other electric rates which Appellants claim create interstate commerce impacts (interruptible rates charged by Colorado-Ute members to retail

---

[5] Empire Electric and many other Colorado-Ute members use a demand energy rate structure for retail service provided to larger customers.

customers, wheeling rates charged other utilities by Colorado-Ute, and rates for purchases from qualifying facilities) were not at issue in the Colorado PUC proceeding giving rise to this appeal.

The facts in this appeal are virtually on "all fours" with the facts in the *Arkansas Electric* decision. No REA preemption will be asserted. There is no need to "refine" *Arkansas Electric*. The decision of the Colorado Supreme Court should be summarily affirmed, or alternatively, this appeal should be dismissed because it fails to present any substantial federal question.

II. APPELLANTS' DUE PROCESS CHALLENGE ON THE FAILURE TO PROVIDE COMPUTER CODES IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

Appellants claim they were denied due process in the Commission hearing because they were denied access to proprietary computer codes, program plans, program manuals and input and output modules. The Commission made the following findings concerning this matter in its Decision No. C83-1392 (September 7, 1983):

> Third, Colorado-Ute argues a due process violation on the basis of the Staff's refusal to provide Colorado-Ute with a copy of the WASP-82 analysis which, according to Colorado-Ute, foreclosed it "any opportunity to effectively cross-examine Staff witness Wendling." In fact, as Colorado-Ute knows, the record clearly establishes that the Commission went out of its way to accommodate Colorado-Ute's concerns in this regard by encouraging a full exchange of information between the Staff and Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature thereof. The Commission has reviewed

> the transcripts of this proceeding, and especially those portions relating to the dialogue between the Staff, Colorado-Ute, and the Commission relating to the WASP-82 program. The bottom line is that Colorado-Ute employee Raymond Keith, on the record, was explicitly asked by the Chairwoman of the Commission "Is that (referring to the information to be supplied by the Staff of the Commission to Colorado-Ute) going to give you sufficient time to analyze and do what needs to be done?" Mr. Keith replied: "I believe it will. The only thing I can think of would be some clarification on the part of the print-outs that can be handled by either direct conversation or by telephone, but I don't think I'll need any additional paper prepared."
>
> Colorado-Ute cannot have it both ways. It agreed, on the record, that the information that would be given to it by the Staff would enable it to have sufficient time to analyze and to do what needed to be done. It cannot now claim that it was disadvantaged notwithstanding its counsel's pro forma objection on the record. (See October 26, 1982 transcript, p. 61).

(Appellants' A-144, 145).

The Montrose, Colorado District Court, in reviewing Colorado-Ute's due process objections with respect to the computer evidence, rejected Colorado-Ute's arguments, making the following findings:

> Colorado-Ute next argues that its right to due process under the Fourteenth Amendment to the United States Constitution and under Article II, § 25 of the Colorado Constitution, was violated by admitting testimony based on the WASP-82 computer analysis, and that the Commission violated C.R.S. 1973, 24-72-304 (The Colorado Open Records Act), in refusing to provide Colorado-Ute with a copy of the WASP-82 computer program. The Court rejects this argument advanced by Colorado-Ute. Hearings in

> this case were held before the Commission on seven separate days between October 6, 1982 and ending November 16, 1982. While Colorado-Ute is entitled to due process as set forth in *Mountain States T. and T. Co. v. Department of Labor*, 184 Colo. 334, 520 P.2d 586 (1974), a review of the record discloses that Colorado-Ute did not receive information on the WASP-82 analysis and did sponsor testimony as a result thereof. This matter was discussed at length at the hearing date on October 26, 1982, and again on November 15, 1982. Colorado-Ute erroneously stood on their objection and did not cross-examine Staff witness Mr. Wendling, and did so at their own peril. Based upon the application for re-hearing, the Commission in its Decision No. 1392 addressed this issue on pages 3 and 4 of that Decision, and a review of the record in that regard clearly substantiates the Commission in that regard. The Court therefore finds that the Commission neither violated the Colorado Open Records Act nor Colorado-Ute's right to due process under the Fourteenth Amendment to the U.S. Constitution or Article II, § 25 of the Colorado Constitution.

(Appellants' A-85).

No appeal was taken from this district court ruling. Appellants did not raise this issue before the Colorado Supreme Court until they filed their petitions for rehearing which were summarily denied.

The computer code issue does not give rise to procedural due process concerns but instead reflects a faulty trial strategy on the part of Appellants. A Colorado-Ute employee stated on the record that he had sufficient information to review the computer analysis. The Commission directed its staff to cooperate fully with Colorado-Ute to enable Colorado-Ute to review the computer analysis, subject to protecting information proprietary to the author of the computer software, information that the

Commission staff could not legally disclose. Although given fair opportunity to testify against Commission consideration of the computer analysis and to critique that analysis through cross-examination, Colorado-Ute chose to use the "stonewalling" technique described above by the Commission and the district court. As found by the district court, Colorado-Ute employed this tactic "at their own peril." This possible error of litigation strategy cannot be elevated into a substantial federal question of due process worthy of consideration by this Court.

III. THIS COURT LACKS JURISDICTION OVER THE TWO QUESTIONS RAISED BY APPELLANTS BECAUSE NEITHER QUESTION WAS TIMELY RAISED OR EXPRESSLY PASSED ON BY THE COLORADO SUPREME COURT.

Appellants admit in their Jurisdictional Statement that they did not raise either question presented for appeal before the Colorado Supreme Court until they filed their petitions for rehearing. Under Rule 40(a) of the Colorado Appellate Rules, no answer to a petition for rehearing will be received unless requested by the court. (*See* Colorado PUC App. 16). The Colorado Supreme Court requested no answers to Appellants' petitions for rehearing. The order of the Colorado Supreme Court denying the petition for rehearing read as follows:

> Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,
>
> IT IS THIS DATE ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

(Appellants' A-153).

It has long been the general rule of this Court that raising a federal question for the first time in a petition for rehearing in the highest state court having jurisdiction to review the question is insufficient to confer jurisdiction on this Court under 28 U.S.C. § 1257(2), unless the highest state court actually entertains the petition and expressly decides the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council of Virginia*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). The Colorado Supreme Court's summary denial of the petitions for rehearing clearly demonstrates that the Colorado Supreme Court did not expressly decide the federal questions presented in this appeal.

Moreover, Appellants never raised a sufficient Commerce Clause challenge before the Colorado Supreme Court. The petition for rehearing filed by Colorado-Ute makes only a one sentence reference to an undue burden on interstate commerce. With respect to the Supremacy Clause and REA preemption, the preemption issue that was presented to the Colorado Supreme Court was set forth in Colorado-Ute's Petition for Rehearing as follows:

> The Rural Electrification Administration (REA), an agency of the federal government, approved the flat rate proposed by Colorado-Ute. According to Colorado-Ute's mortgage with the United States, the approval of its rates is a prerequisite to their implementation. It is well settled that a state commission may not impose regulations that conflict with those

> promulgated by the REA. *See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983). Consequently, the PUC had no right to impose rates on Colorado-Ute inconsistent with those approved by the REA. [Footnotes omitted.]

(Appellants' A-170).

The preemption issue presented to the Colorado Supreme Court was whether the Colorado PUC order conflicted with a Colorado-Ute mortgage requirement. No reference to the direct or inferred preemption argument based upon recent actions of the REA was presented to the Colorado Supreme Court.

Similarly, the computer code issue was not raised by Appellants until their petitions for rehearing. The Colorado Supreme Court did not grant rehearing on this issue.

Consequently, since the Colorado Supreme Court did not expressly pass on the federal issues raised by Appellants in their Jurisdictional Statement, and these issues were not timely presented to the Colorado Supreme Court, this Court lacks jurisdiction to consider these issues.

CONCLUSION

For the reasons set forth above, Appellee Empire Electric Association, Inc. respectfully requests the Court to affirm the decision of the Colorado Supreme Court or, alternatively, to dismiss this appeal.

Respectfully submitted,

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Letter from the United States Rural Electrification Administration to Roderick D. Myers, Chairman of the Board of Colorado-Ute Electric Association, Inc., dated November 14, 1988 .. App. 4

United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

Mr. Girts Krumins, President
Colorado-Ute Electric Association, Inc.
P.O. Box 1149
Montrose, Colorado 81402

Aug. 12, 1988

RE: Colorado 46 Ute
Change in Rate Structure

This is in response to your letter dated July 25, 1988, to Mr. Jack Van Mark, advising REA of recent action by the Supreme Court of Colorado which basically affirms a 1983 Colorado Public Utilities Commission (Commission) order, requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate for its member systems and requesting REA to intercede with the Commission towards the end of permitting Colorado-Ute to retain its current uniform wholesale energy rate. We understand that Colorado-Ute and its members believe that any change to the present form of wholesale rate will adversely impact their operations.

The United States Supreme Court, in its decision of Arkansas Electric Cooperative Corp. v Arkansas Public Utility Commission, 461 U.S. 375, May 16, 1983 took the position that a state may regulate the wholesale rate of an REA borrower where the member systems are all in that state. Historically, REA has taken the position that it does not interfere with state regulatory authority decisions unless REA's loan security is endangered.

Our main responsibility is that any rate structure approved by a state commission is equitable to members

of a power supply borrower and sufficient to enable the borrower to repay all indebtedness and provide a reasonable margin. While REA found that Colorado-Ute's energy rate met this criteria, Colorado-Ute and its members should recognize that demand-energy rates, which are used almost universally by REA power supply borrowers and investor-owned utilities, also satisfy this criteria. Unless REA receives evidence which clearly indicates that the Government's loan security, either to Colorado-Ute or its member systems, is endangered, REA does not intend to take a position which is contrary to the Commission.

Since a number of your member systems have expressed interest in this matter, a copy of this letter is being sent to each of them for their information.

Sincerely,

/s/ Martin G. Seipel
MARTIN G. SEIPEL
Director
Southwest Area - Electric

United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

Mr. Neal E. Stephens, Manager
Empire Electric Association, Inc.
P. O. Drawer K
Cortez, Colorado 81321

Dec. 22, 1988

Dear Mr. Stephens:

This is in response to your letter dated December 16, 1988, requesting correspondence between the Rural Electrification Administration (REA) and Colorado-Ute Electric Association, Inc. (Colorado-Ute), regarding the Colorado Public Utilities Commission's order requiring Colorado-Ute to adopt a seasonally – differentiated demand energy rate. Enclosed is a copy of our letter of November 14, 1988, which is the only such correspondence REA has had with Colorado-Ute since August 12, 1988.

Sincerely,

/s/ Thomas W. Nusbaum
THOMAS W. NUSBAUM
Chief, Operations Branch
Southwest Area - Electric

Mr. Roderick D. Myers
Chairman of the Board
Colorado-Ute Electric
Association, Inc.
P. O. Box 1149
Montrose, Colorado 81402

Nov. 14, 1988

Dear Mr. Myers:

This is in response to Colorado-Ute's letter dated October 14, 1988, requesting that REA reconsider its earlier position and to intercede, in Colorado-Ute's behalf, before the Colorado Public Utilities Commission (Commission), the Federal District Court and the United States Supreme Court in order to allow Colorado-Ute to retain its current uniform wholesale energy rate and to prevent certain wholesale power refunds from being ordered by the Commission. As we have previously indicated, REA believes that there is no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate.

REA believes that it is premature to consider any action with respect to Colorado-Ute's potential liability resulting from refunds or damages since, at this time, there are no proceedings considering that specific issue. However, we are very interested in Colorado-Ute's financial viability and, at such time as refund proceedings may be initiated, REA would consider making our views known to the Commission.

With respect to the Commission's decision dated August 24, 1988, which is pending further judicial review, we believe that Colorado-Ute should, depending on the decision of the District Court, take immediate action to file with the Commission for increased revenues. We are

aware that the rate level ordered by the Commission dates back to 1983, with two subsequent rate level changes placed into effect since that time. REA has been concerned for quite some time over the fact that Colorado-Ute has been experiencing significant operating losses since 1985. Because of these concerns, REA directed Colorado-Ute, in letters dated November 24, 1986, and December 18, 1986, not to place into effect the 5 percent rate reduction and to design rates to achieve operating results at a level sufficient to meet mortgage requirements. Considering Colorado-Ute's financial position, we believe that Colorado-Ute should file for an immediate rate increase, based on current test year data, sufficient to meet a TIER in excess of 1.0.

Please advise us as to what actions Colorado-Ute intends to take with respect to existing rate levels in light of continuing operating losses and keep us informed as to when hearings for refunds or damages are scheduled to commence.

Sincerely,

/s/ MGS 11/14/88
MARTIN G. SEIPEL
Director
Southwest Area - Electric

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 88-977

In The

Supreme Court of the United States

October Term, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., et al.,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The questions presented by this motion to dismiss or affirm are:

1. Whether this Court should consider questions that were not presented to or passed upon by a State Supreme Court?

2. Whether this Court should consider questions that have already been settled by established precedent?

LIST OF PARTIES

The affiliates and partially-owned subsidiaries of Appellees Atlantic Richfield Company and Exxon Corporation are listed in the Appendix to this Motion.

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COUNTERSTATEMENT OF THE CASE

This case involves nothing more than a utility's dissatisfaction with the result of a garden variety rate proceeding before the Colorado Public Utilities Commission.[1] Pursuant to its powers under Colorado Revised Statute § 40-6-111, the Commission independently investigated the propriety of Colorado-Ute Electrical Association, Inc.'s proposed rate increase. The Commission approved the rate increase, but rejected as unduly discriminatory Colorado-Ute's "all energy" rate design. The Commission ordered Colorado-Ute to implement a rate design that included not only an energy charge (reflecting primarily the cost of fuel burned to generate the electricity consumed), but also a demand charge (reflecting the fixed costs of the facilities necessary to meet a consumer's demand at peak times). The rate design required by the Commission was found to provide consumers with more accurate pricing signals.

Colorado-Ute and its member cooperatives challenged the commission's decision in the Colorado courts.[2] They principally contended that Colorado Revised Statute § 40-6-111 did not empower the Commission to investigate the rates of an electrical cooperative such as

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[1] Appellees Atlantic Richfield Company and Exxon Corporation join in the Colorado Public Utilities Commission's more comprehensive statement of the facts appearing at pages 1-6 of the Commission's Motion to Dismiss or Affirm.

[2] All 14 of Colorado-Ute's members challenged the Commission's decision in the Colorado courts. One member, Empire Electric Association, Inc., has since reconsidered its position and has not joined in the jurisdictional statement filed with this Court.

Colorado-Ute absent a complaint by one of the cooperative's customers, and that, in any event, the record showed the Commission's decision to be unsupported. On review, the district court ruled in favor of Colorado-Ute and its members on the jurisdictional point. Appellants' Appendix ("AA") 74-76. The Colorado Supreme Court reversed, reinstating the commission's rate design with one modification not material to the present appeal.[3] AA 16-47.

At this point, Colorado-Ute and its members each filed petitions for rehearing based upon two arguments they had previously waived or abandoned: (1) by empowering the Commission to investigate Colorado-Ute's rate design, Colorado Revised Statute § 40-6-111 conflicts with the Rural Electrification Act, 7 U.S.C. §§ 901, *et seq.*, in violation of the Commerce and Supremacy Clauses, U.S. Const. art. I, § 8, cl.3 & art. VI, cl.2, and (2) by not providing Colorado-Ute with a copy of the WASP-82 computer program,[4] the Commission violated

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[3] The Commission had shifted approximately $24 million of demand costs into the energy component of the rate. The Colorado Supreme Court found this shift to be unsupported and set aside this limited aspect of the Commission's decision. AA 38-47.

[4] The Commission Staff uses the WASP-82 program to evaluate the benefits of *retail* rate designs, making it of questionable relevance to this proceeding which involved only questions of *wholesale* rate design. *See* AA 110; Commission Motion to Dismiss or Affirm at 2-3.

Colorado-Ute's due process right to obtain all information necessary to effectively cross-examine the Commission's witnesses.[5] AA 162-84. The Colorado Supreme Court denied the petitions for rehearing without comment. AA 152. Colorado-Ute and its members now seek review of that summary decision.

SUMMARY OF ARGUMENT

Colorado-Ute and its members seek review of the Colorado Supreme Court's denial of their petitions for rehearing pursuant to 28 U.S.C. § 1257(2). Section 1257(2) bestows this Court with jurisdiction over substantial federal questions properly raised before a state court. The questions Colorado-Ute and its members urge on this Court were not properly or timely presented to the Colorado Supreme Court and are not substantial. Therefore, appellants' jurisdictional statement should be dismissed pursuant to Supreme Court Rule 16(b). In the alternative, this Court should affirm the Colorado Supreme Court's decision pursuant to Supreme Court Rule 16(d).

ARGUMENT

The federal questions presented in appellants' jurisdictional statement are not substantial for two reasons. First, Colorado-Ute and its members did not properly present these questions to the Colorado Supreme Court, thereby providing an independent and adequate state

[5] Colorado-Ute's petition for rehearing raised both of these points, AA 170-71; that of its members raised only the preemption issue, AA 179-84.

ground for the Colorado Supreme Court's summary dismissal of their petitions for rehearing. Second, settled precedent makes clear that on the facts of this case the questions presented are without merit.

A. This Court Does Not Have Jurisdiction Over Questions Not Properly Presented To A State Supreme Court.

Under Colorado law, Colorado Supreme Court review of Commission decisions extends only to issues properly presented at every stage of the proceedings, from the initial hearing before the Commission through oral argument at the Colorado Supreme Court. *See, e.g., Denver Clean-Up Service, Inc. v. Public Utilities Commission,* 174 Colo. 329, 483 P.2d 974, 975 (1971). Colorado-Ute and its members failed to present their questions in accordance with this procedure, and the Colorado Supreme Court did not pass on them. Therefore, Colorado-Ute and its members have no claim to jurisdiction in this Court. *See, e.g., Illinois v. Gates,* 462 U.S. 213, 218-22 (1983).

The Colorado Supreme Court did not address the first issue -- whether the Commission's regulation of Colorado-Ute's rate design violated the Commerce and Supremacy Clauses -- for legitimate reasons. First, Colorado-Ute and its members failed to raise the issue before the district court during its review of the Commission's decision. *See Denver Clean-Up Service, Inc.,* 483 P.2d at 975; *cf. City & County of Denver v. Miller,* 151 Colo. 444, 379 P.2d 169, 171 (1963) (supreme court generally will not consider issues not raised before trial court). Second, Colorado-Ute and its members did not make this argument before the Colorado Supreme Court in either their

briefs or their argument in support of the district court's finding that the Commission lacked jurisdiction to modify Colorado-Ute's rate structure. *See Beck v. Washington*, 369 U.S. 541, 549-50 (1962) (finding constitutional challenge not properly before Court under very similar facts).

The Colorado Supreme Court likewise did not address the second issue -- an alleged due process violation arising out of appellants' failure to acquire a copy of the WASP-82 computer program. Colorado-Ute and its members lost this issue in the district court, AA 85, but did not cross-appeal to the Colorado Supreme Court, presumably because they had prevailed on the jurisdictional issue. *See* AA 171. Appellants' procedural laxity is fatal. Where, as here, the prevailing party seeks to change the judgment in any respect, it must cross-appeal. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). *See also* Colo. App. R. 4(a) (if one party files notice of appeal, all other parties have 14 days to cross-appeal). The failure of Colorado-Ute and its membes to cross-appeal as required by Colorado Appellate Rules 3 and 4,[6] "deprives the appellate court of jurisdiction and precludes a review of the merits" of the issue in question. *Widener v. District Court*, 200 Colo. 398, 615 P.2d 33, 34 (1980) (citing *Bosworth Data Services, Inc. v. Gloss*, 41 Colo. App. 530, 587 P.2d 1201, 1202 (1978)). *Accord Meeker v. Post Printing & Publishing Co.*, 55 Colo. 355, 135 P. 457, 460 (1913) ("the proper way to have had the question determined was by cross-assignments of error").

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[6] Rules 3 and 4 of the Colorado Appellate Rules are based on the Federal Rules of Appellate Procedure and the same duties to notice an appeal apply. *Chapman v. Miller*, 29 Colo. App. 8, 476 P.2d 763, 764 (1970).

Colorado-Ute and its members seek to overcome these fatal flaws by pointing to their petitions for rehearing to the Colorado Supreme Court which belatedly raised these issues. However, it has long been settled in Colorado that, absent extraordinary circumstances, questions not presented on the original hearing of the case will not be considered on rehearing. *Isham v. Miller,* 80 Colo. 380, 252 P. 353, 354 (1926); *Meeker v. Post Printing & Publishing Co.,* 135 P. at 460. *See generally* Colo. App. R. 40(a) (argument and response briefs generally not permitted unless petition for rehearing granted). The Colorado Supreme Court denied the petitions for rehearing without comment, a well-accepted practice under such circumstances. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte,* 107 S. Ct. 1940, 1948 (1987) (in such circumstances, state court's failure to address issue presumed to be because issue not properly presented). This Court should do the same. *See, e.g., Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 128 (1945) ("[q]uestions first presented to the highest state court on a petition for rehearing come too late for consideration here"); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin,* 287 U.S. 156, 163-64 (1932).

The facts of this case demonstrate why "[i]t is well settled that this Court will not review a final judgment of a state court unless the record as a whole shows . . . that the federal claim was adequately presented in the state system." *Rotary International,* 107 S. Ct. at 1948 (internal quotation omitted). First, because these issues were not properly raised or fully developed below, "the record is very likely to be inadequate since it certainly was not

compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Second, proper presentation of these issues to the Colorado Supreme Court might well result in a construction of Colorado's statute or constitution that obviates the alleged conflicts with the federal statute or constitution. *See, e.g., Illinois v. Gates*, 462 U.S. at 221-22. Thus, whether the need to have the questions "presented and passed upon" below is treated as a jurisdictional requirement or a prudential limitation, it operates here to preclude review.[7] *Id.* at 218-22.

B. The Questions Presented Are Not Substantial.

Colorado-Ute and its members contend that the questions presented will resolve novel issues. Jurisdictional Statement, AA 9-19. As framed by the facts of this case, however, the questions presented are not novel, and fall within existing precedents. Therefore, they are not substantial. *See, e.g., Martin v. Walton*, 368 U.S. 25, 25-26 (1961) (per curiam); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391-92 (1952) (per curiam).

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[7] Colorado-Ute and its members do not and cannot assert that this is one of those "exceptional cases" whose particular circumstances justify this Court's exercising jurisdiction over questions not properly presented below. *Cf. Youakim v. Miller*, 425 U.S. 231, 234-35 (1976) (appropriate for Court to remand improperly-raised Supremacy Clause issue to district court for consideration where administering federal agency issued a new interpretation of the relevant federal statute after proceedings below had concluded).

Colorado-Ute and its members first assert that this Court should exercise jurisdiction over their claims under the Commerce and Supremacy Clauses in order to "refine" the decision in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983). Jurisdictional Statement, AA 9-10. In *Arkansas Electric*, the Court faced challenges under the Commerce and Supremacy Clauses to a state utility commission's regulation of the rates charged by a utility that had received loans under the Rural Electrification Act. The Court rejected these challenges, holding that the REA does not implicitly preempt state regulation of utility rates, at least absent evidence that the rate set by the state imperils the utility's ability to pay back its REA loan. *Arkansas Electric*, 461 U.S. at 389. The Commerce and Supremacy Clause issues Colorado-Ute and its members raise in this case are identical to the ones decided in *Arkansas Electric*. Therefore, these questions cannot be considered novel or substantial. *See, e.g., Martin*, 368 U.S. at 25-26; *Palmer Oil Corp.*, 343 U.S. at 391-92.

Furthermore, this case does not present the Court with a suitable opportunity to "refine" the holding in *Arkansas Electric*. Here, the Commission did not reject even a portion of the rate increase sought by Colorado-Ute; it simply changed the relative share of the rate that Colorado-Ute could collect from each of its customers. Colorado-Ute and its members point to no evidence in the record -- largely because neither the parties nor the Colorado courts addressed the issue -- that this shift in rate design will have any impact whatsoever on Colorado-Ute's ability to repay its loans to the federal government. In fact, based on this record, one can only conclude

that the change in rate design will have no impact on the total revenues realized by Colorado-Ute. *See* AA 102-09 (approving full amount of requested rate increase).

The second issue presented by Colorado-Ute and its members is that their failure to obtain a copy of the WASP-82 computer program allegedly violated their due process right to obtain the information necessary to effectively cross-examine one of the Commission's witnesses. However, when Colorado-Ute requested discovery of the WASP-82 program, the Commission agreed to a full exchange of information, subject to the program's proprietary nature. On the record, Colorado-Ute conceded that the information to be provided would give Colorado-Ute everything it needed to prepare its case:

> [T]he record clearly establishes that the Commission went out of its way to accommodate Colorado-Ute's concerns in this regard by encouraging a full exchange of information between the [Commission] Staff and Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature thereof. . . . The bottom line is that Colorado-Ute employee Raymond Keith, on the record, was explicitly asked by the Chairwoman of the Commission "Is that (referring to the information to be supplied by the Staff of the Commission to Colorado-Ute) going to give you sufficient time to analyze and to do what needs to be done?" Mr. Keith replied: "I believe it will. The only thing I can think of would be some clarification on the part of the print-outs that can be handled by either direct conversation or by telephone, but I don't think I'll need any additional paper prepared."

AA 144. Despite this representation, Colorado-Ute then elected not to cross-examine the Commission's witness, and chose instead to challenge the Commission's failure to turn over the WASP-82 program itself.

The Commission properly found this challenge to be without merit:

> Colorado-Ute cannot have it both ways. It agreed, on the record, that the information that would be given to it by the Staff would enable it to have sufficient time to analyze and to do what needed to be done. It cannot now claim that it was disadvantaged. . . .

AA 144-45.[8] The district court agreed that the facts fully supported the Commission's decision, and chastised Colorado-Ute's behavior: "Colorado-Ute erroneously stood on their objection and did not cross-examine staff witness Mr. Wendling, and did so at their own peril." AA 85. These factual findings should be accorded great weight by this Court. *See, e.g., Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) (absent extraordinary circumstances Supreme Court will not reverse state court's findings of fact).

The Commission's ruling, and that of the district court, was based upon the express representation of Colorado-Ute's own witness that he had all of the information he needed to respond to the Commission Staff's argument. Under these circumstances, the belated claim by Colorado-Ute and its members that they were denied fundamental fairness cannot be considered a substantial one. *See, e.g., United States v. Augenblick*, 393 U.S. 348, 356 (1969).

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[8] Furthermore, the WASP-82 program relates only to retail rate designs, making it of dubious relevance to this wholesale rate proceeding. *See supra* at 2 n.4.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss the claims of Colorado-Ute and its members for want of jurisdiction. In the alternative, the Court should summarily affirm the decision of the Colorado Supreme Court.

Date: February 15, 1989

Respectfully submitted,

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APPENDIX

ATLANTIC RICHFIELD COMPANY

Affiliates and Subsidiaries – Not Wholly-Owned

Agro Internacional, S. de R. L. de C. V.
Alyeska Pipeline Service Company
Anaconda-Iran, Inc.
Anamax Mining Company
ARCO Centennial Corp.
ARCO Channelview, Inc.
ARCO Chemical Asia Pacific, Ltd.
ARCO Chemical Canada, Inc.
ARCO Chemical China, Limited
ARCO Chemical Company
ARCO Chemical Delaware Company
ARCO Chemical (Deutschland) GmbH
ARCO Chemical Espana Co.
ARCO Chemical Europe, Inc.
ARCO Chemical (Europe), Inc.
ARCO Chemical Export Sales Company
ARCO Chemical Foreign Sales Corp. (FSC Co.)
ARCO Chemical Indonesia, Inc.
ARCO Chemical Japan, Inc.
ARCO Chemical Korea, Inc.
ARCO Chemical Middle East, Inc.
ARCO Chemical New Zealand, Inc.
ARCO Chemical Overseas Services, Inc.
ARCO Chemical Pan America, Inc.
ARCO Chemical Products Europe, Inc.
ARCO Chemical (Singapore) PTE, Ltd.
ARCO Chemical Taiwan Inc.
ARCO Chemical Technology, Inc.
ARCO Chemical Texas, Inc.
ARCO Chemical (Thailand) Limited
ARCO Chemical Trading, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chimie France Corporation
ARCO Chimie France S.N.C.
ARCO China Inc.
ARCO Comfort Products Co.
ARCO Durethene Pipe, Inc.
ARCO Durethene Plastics, Inc.

ARCO Elastomers, Inc.
ARCO Energy Conservation, Inc.
ARCO Environmental Inc.
ARCO France, Inc.
ARCO Idemitsu Corporation
ARCO Solar (Europe) GmbH
ARCO Solar Nigeria Ltd.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal, Pty., Limited
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera Dos Republicas S.A. de C.V.
Cook Inlet Pipe Line Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
85819 Canada Limited
EnArco Elastomers Company
EnArco Resins Spa
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum Inc.
Lyondell Petrochemical Company
Nihon Oxirane Company, Ltd.
Platte Pipe Line Company
Rodman, Inc.
Showa ARCO Solar Far East Pte. Ltd.
Smokehouse Copper Mining Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

EXXON CORPORATION

Affiliates and Subsidiaries – Not Wholly-Owned*

Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Asakawa Sekiyu K.K.
Asociacion Civil "Colegio Internacional de Caracas"
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdol GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
BRIGITTA Erdgas und Erdol GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited

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*Does not include companies with less than 5% Exxon Ownership.

Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Commercial Polymers Pty. Ltd.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdol GmbH, Hannover
Elwerath Erdol und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Esso Chemical Alberta Limited
Esso Energie G.I.E.

Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Resources N.W.T. Limited
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F. T. Giken Kabushiki Kaisha
F.T. Shyoji K.K.
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane - Lavera
Gewerkschaft Brassert Erdol und Erdgas GmbH
Gewerkschaft Elwerath & Co. GmbH
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdol GmbH
Gewerkschaft Kuchenberg Erdgas under Erdol GmbH
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.

Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Home Energy Company Ltd.
Home Oil Company Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industry Promotion Enterprises Limited
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Interhome Energy Inc.
Intamix Corporation
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu

K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekivu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LPL Investments, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzernisches Erdol
Les Docks des Petroles d'Ambes
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Maple Leaf Petroleum Limited
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited

Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter
Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
NAM - K 7 B.V.
NAM - K 14 B.V.
NAM - K 15 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
N. V. Nederlandse Gasunie
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Nottingham Gas Limited
107580 Canada Inc.
151742 Canada Inc.
158883 Canada Inc.
159129 Canada Inc.
160837 Canada Limited
Office Prive d'Assurances et de Courtages

Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafeh-Harburg GmbH
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
SEAG Aktiengesellschaft fur schweizerisches Erdol
S.0.P. - Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.

Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar" PROLUMA S.A.
Societe Belge de Transport par Pipeline
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation (S.M.C.A.)

Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Sun East Company Ltd.
Sydis, Inc.
Syncrude Canada Ltd.
Synergistics Industries Limited
System Plaza Kabushiki Kaisha
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
Taglu Enterprises Ltd.
Taihei Bussan K.K.

Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Properties Inc.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Tonex Company Limited
Tophus Quen Pty. Ltd.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG - Unterflurbetankungsanlage Flughafen Zurich
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited

Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdolleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

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No. 88-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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LEGAL ARGUMENT

I.

IT WOULD HAVE BEEN ILLOGICAL FOR COLORADO-UTE AND THE MEMBERS TO HAVE APPEALED THEIR OWN WIN.

Despite the fact that Colorado-Ute and the Members prevailed at the district court level, the appellees insist that, in order to preserve their federal issues in this Court, Colorado-Ute and the Members should have appealed their win to the Colorado Supreme Court. They may have couched this as an argument that the federal issues were not properly raised; what it boils down to, however, is that they contend appellants should have appealed their own win.

When they argue, for example, that this appeal should be dismissed because the federal issues were not passed on below, when they enumerate the various avenues available to Colorado-Ute and the Members to raise the federal issues in the Colorado Supreme Court, and when they contend that the Colorado Supreme Court will not entertain issues raised for the first time on petition for rehearing, what they are actually asserting is that Colorado-Ute and the Members should have appealed their own win.

What has completely escaped the appellees throughout their argument is the impracticality of appealing a win. It is undisputed that the district court ruled that the PUC's decision was erroneous and that Colorado-Ute was not required to implement the PUC-ordered rate.[1] A cross-appeal would have required attacking the favorable decision of the district court.

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[1] See Appendix to Jurisdictional Statement, A-86.

Even raising the federal issues in the answer brief would have had tactical drawbacks by requiring Colorado-Ute and the Members to devote a part of their briefs on appeal to issues not responsive to the issues raised by the opposing parties. Given the space limitations imposed by the Colorado Supreme Court, raising issues that were not part of the lower court's decision may have ultimately hampered Colorado-Ute's argument. In any event, either approach would have clearly created a substantive disadvantage for Colorado-Ute and the Members in defending the appeal.

Finally, the rule pushed by appellees would force litigants at every stage of the appellate proceedings to reiterate each and every argument they might have concerning a federal issue in order to properly preserve it. Such a requirement unduly burdens the appellate courts and the parties and frustrates judicial economy.

Under circumstances such as these, where: (1) the federal issues are properly raised before the agency and the trial court below; (2) the appellant prevails at the trial court; (3) to raise the federal issues before the appellate court would be tantamount to appealing a win; and (4) the appellant raises the issues in the state court by way of a timely petition for rehearing which is subsequently denied, this Court should not, as a matter of policy, preclude consideration of a bona fide issue on the basis that the issue was not properly preserved. Applying this standard to Colorado-Ute and the Members, it is clear that to reject the appeal on this basis would unfairly penalize Colorado-Ute and the Members for pursuing a commonsense legal strategy.

II.

APPELLEES HAVE ATTEMPTED TO OBSCURE THE TRUE ISSUE RELATING TO THE COMMERCE AND SUPREMACY CLAUSES.

The issue here is not, as suggested by the appellees, whether the REA has actually attempted in this case to preempt the PUC's actions in ordering the demand-energy rate. The issue is rather, whether the PUC's order exceeds the permissible bounds of regulation of rural electric cooperatives operating in interstate commerce. Colorado-Ute and the Members pointed out, however, that in order for this Court to decide the propriety of the PUC order, this Court needed to reexamine and refine its opinion in *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n.*, 461 U.S. 375 (1983) in light of the facts of this case and the changes that have taken place since that decision.

Appellees are, therefore, attacking a position that Colorado-Ute and the Members clearly did not take. Whether or not the REA has chosen to intervene in this particular case is not conclusive with respect to the limits on state regulation of rural electric cooperatives in interstate commerce imposed by the Commerce and Supremacy clauses.

In *Arkansas Electric*, this Court indicated that its decision there might change if the REA altered its policy regarding the level of its involvement with rural electric cooperatives or if a specific rate imposed by a state regulatory body would seriously impair the ability of the cooperative to meet its federal obligations.

Here, Colorado-Ute and the Members have demonstrated that the REA's policy has, in fact, changed. The REA's actions with respect to Wabash Valley Power Association, Inc. and Big Rivers Electric Corporation are clear examples of both direct and "inferred preemption."[2] The cloud that such actions have cast over the dividing line between state and federal authority to regulate rates of rural electric cooperatives operating in interstate commerce is now so substantial that this Court should reexamine *Arkansas Electric*.

Moreover, there is evidence in the record that the change in rate structure ordered by the PUC would seriously impair Colorado-Ute's ability to repay its debt under the REA mortgage. Under these circumstances, the PUC's ability to regulate Colorado-Ute is subject to limitation under the Constitution of the United States. If, as argued here, the PUC does not have the authority, consistent with constitutional limitations, to regulate Colorado-Ute, it is not important what the REA's position in this situation might be. The REA letters to Colorado-Ute upon which appellees so heavily rely are, therefore, not controlling on the larger question of the constitutional limits on state regulation raised above. Furthermore, those letters do not rule out REA intervention with the Colorado PUC.[3]

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[2] See Jurisdictional Statement at 12-14.

[3] The letter of November 14, 1988 specifically noted that "at such time as refund proceedings may be initiated, REA would consider making our views known to the Commission." See, Motion to Dismiss or Affirm filed by Shell Western E&P Inc. at A-4.

III.

COLORADO-UTE AND THE MEMBERS WERE DENIED DUE PROCESS BY BEING DENIED ACCESS TO CRITICAL PORTIONS OF THE WASP-82 PROGRAM.

It is noteworthy in connection with the WASP-82 issue, that although both SWEPI and Empire rely almost entirely on the PUC's own conclusions justifying its refusal to give Colorado-Ute the entire WASP-82 computer program, including the supporting documentation and the supporting data, the PUC itself apparently did not even feel comfortable using that as a justification for denial since it did not cite such conclusions in its Motion to Dismiss or Affirm.

While arguing so vigorously that Colorado-Ute and the Members had access to some of the computer-related information, the appellees conveniently ignore that without access to all of the requested information, the ability to adequately cross-examine staff witnesses and to impeach the results of the computer-generated study was severely impaired.[4] As noted in appellants' Jurisdictional Statement,[5] a PUC staff witness testified that it would take Colorado-Ute four months

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[4] Appellees rely heavily on the fact that Mr. Raymond Keith, a Colorado-Ute employee, testified that the information about the WASP-82 program provided to Colorado-Ute by the PUC staff was sufficient. It should be noted that Mr. Keith was called as a witness by the PUC and was not testifying on behalf of Colorado-Ute. His testimony is, therefore, not binding on Colorado-Ute.

[5] Jurisdictional Statement at 17.

to replicate his computer analysis if Colorado-Ute had access to all the program information but the PUC denied such full access.

Due process requires that Colorado-Ute and the Members have a meaningful opportunity to be heard. Without the information withheld by the PUC, that opportunity was rendered worthless. It must not be forgotten that the results of the PUC staff's use of the WASP-82 program, predicting benefits which "would" result from a change to a demand-energy rate, were critical to the PUC's ultimate decision.

Given the ever increasing use of computer-generated evidence in the courtroom, this issue is of the utmost significance and should be addressed by this Court in this case.

CONCLUSION

For these and the reasons set forth in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

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